Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

80-590

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

CHARLES D. KENNEDY
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380
Attorney for Petitioner Gulf Offshore Company, A Division of the Pool Company

OF COUNSEL:

BRADLEY A. JACKSON
ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1.

Whether the Courts of the State of Texas have subject matter jurisdiction to hear causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979)?

2.

Whether the rule of law regarding instructions to the jury that any award of damages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt,* 48 U.S.L.W. 4132 (Feb. 19, 1980), is applicable and controlling in an action arising under the Outer Continental Shelf Lands Act?

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition;

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L. A. Levy, Inc.
   Offshore Crews, Inc.
   Unknown underwriters at interest with the Levy entities, which assumed Respondent's defense.
2. Steven Gaedecke, Plaintiff.
3. Jamail & Kolius, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.
6. Underwriters subscribing Policy No. J.F.X. 0007, issued to Ensearch Corp. and Pool Offshore Company.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
SUBJECT INDEX	III
LIST OF AUTHORITIES	III
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. Important Jurisdictional Question	7
II. Conflict With The United States Supreme Court	16
CONCLUSION	20
CERTIFICATE OF SERVICE	21
APPENDIX A (Opinions And Judgments Below)	A-1
APPENDIX B (Raising The Federal Questions Presented)	B-1

LIST OF AUTHORITIES

CASES

	Page
Barnes v. Bituminous Casualty Corp., 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref. n.r.e.)	16
Borne v. Tenneco Oil Company, 1973 A.M.C. 388 (E.D. La. 1972)	9, 14
Cazad v. Chesapeake & Ohio Ry., 622 F.2d 72 (4th Cir. 1980)	19
City of Beaumont v. West, 484 S.W.2d 789 (Tex. Civ. App.—Beaumont 1972, writ ref. n.r.e.)	16
Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 (E.D. La. 1972)	9, 13
Friedrich v. Whittaker Corporation, 467 F.Supp. 1012 (S.D. Tex. 1979)	9, 14

CASES

Page

Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301) 8
Lang v. Texas & P. Ry. Co., 624 F.2d 1275 (5th Cir. 1980) 18, 19
Norfolk & Western Railway Company v. Liepelt, 48 U.S.L.W. 4132 (Feb. 19, 1980) 16, 17, 18, 19
Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) 14, 15, 18
Southwestern Bell Tel. Co. v. City of Kountze, 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976) 16

UNITED STATES STATUTES

28 U.S.C. § 1257(3) 2
43 U.S.C. § 1331, *et seq.* (Supp. 1979) 2, 4, 7
43 U.S.C. § 1332 (Supp. 1979) 12
43 U.S.C. § 1333 .....2, 3, 10, 11, 12, 13

MISCELLANEOUS

30 A.L.R. Fed. 535 (1976) 13

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas entered in the above-entitled case on December 12, 1979.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 594 S.W.2d 496 and is printed in Appendix A to this

Petition, *infra*, p. A-1. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in Appendix A, *infra*, p. A-20. The judgment of the District Court of Harris County is printed in Appendix A, *infra*, p. A-22.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on December 12, 1979. A timely Motion for Rehearing was filed on December 27, 1979, and overruled on January 9, 1980. Application to the Supreme Court of Texas for Writ of Error, filed February 8, 1980, was refused without opinion with the notation "no reversible error" on June 18, 1980. Timely Motion for Rehearing, filed July 3, 1980, was overruled on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). [The opinion of the Court of Civil Appeals [illegible]eals in pertinent part with federally created rights under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979).]

STATUTE INVOLVED

Section 1333 of Title 43 of the United States Code, as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon.

Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

> (b) The United States district courts shall have original jurisdiction of cases and controversies aris-

ing out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the Outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose.

Subsection (a) provided that:

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Sheif and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, *to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction* located within a State: Provided, however, that mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter. (Emphasis supplied).

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf, and the President shall determine and publish in

the Federal Register such projected lines extending seaward and defining each such area. *All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.* State taxation laws shall not apply to the Outer Continental Shelf. (Emphasis supplied).

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in *or jurisdiction* on behalf of any State *for any purpose* over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (Emphasis supplied).

STATEMENT OF THE CASE

This is an oil company (Respondent Mobil)/drilling contractor (Petitioner Gulf Offshore) contractual indemnity case arising in the area governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979). Respondent's action for contractual indemnity against Petitioner was brought as a third party action in a suit by a personal injury plaintiff, Gaedecke, against Respondent, which action also arose in the area governed by the Lands Act.

On July 9, 1974, Petitioner and Respondent entered into Contract No. 1159, which concerned oil well completion operations to be performed by Petitioner on Respondent's platform wells situated in Grand Isle Block 95 offshore of the State of Louisiana on the Outer Continental Shelf.

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula in the Gulf of Mexico and regained strength, necessitating evacuation of offshore oil platforms

in the Gulf, including the platform upon which Petitioner was performing its completion work for Respondent.

Personal injury plaintiff Gaedecke was injured on September 22, 1975, following his evacuation from the platform to a work boat.

Plaintiff Gaedecke sued Respondent and three additional companies associated with the work boat, L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. for personal injuries sustained as a result of the accident. Respondent filed a Third Party Complaint against Petitioner, alleging liability for indemnity on both tort and contract theories.

Prior to trial, Plaintiff Gaedecke settled with Respondent and the Levy defendants, which had assumed Respondent's defense. Plaintiff proceeded solely against Respondent which, in turn, sought *contractual* indemnity from Petitioner.

Trial was to a jury, which found that Respondent Mobil, by its negligence as offshore platform owner, proximately caused the injuries to Plaintiff. Damages of $900,000.00 were found. The jury also found that Plaintiff's injuries were incident to or resulted directly or indirectly from the work of Petitioner under its contract with Respondent. Judgment for $900,000.00 was rendered in favor of Plaintiff against Respondent, out of which the Intervenor was awarded recovery of the sum of $32,712.09, its workers' compensation lien. Judgment for contractual indemnity in the amount of $900,000.00 was rendered against Petitioner.

Petitioner first raised the federal question pertaining to subject matter jurisdiction sought to be reviewed herein by its First Amended Answer to Respondent's Third

Party Complaint. (Tr. 38-42) and printed in Appendix B, *infra*, p. B-1. Petitioner objected to the Court's lack of subject matter jurisdiction in such Answer and again raised the point by Motion for Summary Judgment prior to trial. (Tr. 123-125). The point was renewed in Petitioner's Motion for Instructed Verdict (Tr. 205-211), in Petitioner's Motion for Judgment Non Obstante Veredicto (Tr. 213-216), in Petitioner's Amended Motion for New Trial (Tr. 276-282) and as Petitioner's first point on appeal to the Court of Civil Appeals and to the Supreme Court of Texas.

The Motion for Summary Judgment, Motion for Instructed Verdict, Motion for Judgment Non Obstante Veredicto and Amended Motion for New Trial were all overruled by the Trial Court. The Court of Civil Appeals affirmed the Trial Court's judgment, holding that the the Courts of the State of Texas have subject matter jurisdiction. The Supreme Court of Texas denied Petitioner's Application for Writ of Error.

Petitioner raised the federal question regarding appropriate instruction to the jury on the issue of taxation of any damage award by requesting that an instruction be given to the jury on the issue. Instruction C was requested in a timely and appropriate fashion prior to finalization of the jury charge but was refused by the Trial Court. (Tr. 198-199, 200-204) and printed in Appendix B, *infra*, p. B-7. Denial of the requested instruction was set forth as a reason for granting a new trial in Petitioner's Amended Motion for New Trial (Tr. 281), but such Motion was overruled. The point was preserved in the appeal to the Court of Civil Appeals as Point of Error 13. The Court of Civil Appeals affirmed the Trial Court on the point. The issue was carried forward as the Twelfth

Point of Error in Petitioner's Application for Writ of Error to the Supreme Court of Texas, but the Application was denied.

REASONS FOR GRANTING THE WRIT

There are two compelling reasons why a review on Writ of Certiorari should be granted in this case:

1. The decision of the Court of Civil Appeals below concerns an extremely important question affecting the jurisdiction of the Federal Courts, is in conflict with another State Court of last resort and is in conflict with decisions of several Federal District Courts.
2. The decision of the Court of Civil Appeals below with respect to the requested jury instruction is in direct conflict with a decision of the Supreme Court of the United States.

I.

IMPORTANT JURISDICTIONAL QUESTION

This Petition presents an important jurisdictional question in regard to the increasing litigation arising out of offshore energy development. Petitioner's position is that the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979) clearly vests subject matter jurisdiction over cases arising under the Act *exclusively* in the Federal Courts.

At virtually every stage of the proceedings in the Trial Court, including pre-trial, trial and post trial, Petitioner objected to the State Court's lack of subject matter jurisdiction. This fundamental error was emphasized on appeal, but the Court of Civil Appeals, and, implicitly, the

Supreme Court of Texas, held that the Lands Act neither intended nor required exclusive jurisdiction in the Federal Courts, becoming the only Courts having considered the question to so hold.

Since one of the Federal District Courts considering the jurisdiction issue and holding in favor of exclusive federal jurisdiction is the United States District Court for the Southern District of Texas, the decision of the Court of Civil Appeals has created a situation ripe for forum shopping and which greatly complicates the question of Federal Court jurisdiction upon removal of cases from State District Courts. By refusing the lead of the Federal District Courts on this important question of interpretation with respect to a federal statute (a reverse *Erie* situation), the Court of Civil Appeals has left the law on the question of subject matter jurisdiction in cases arising under the Lands Act confused and in conflict.

Because of this situation and in view of the increasing litigation arising out of offshore energy development on the Outer Continental Shelf, the issue of subject matter jurisdiction is of greatest importance, and this Court has an obligation to address the question and, hopefully, resolve the conflict.

Additionally, the decision of the Court of Civil Appeals is in direct conflict with the decision of the court of last resort in Louisiana in *Gravois v. Travelers Indemnity Company*, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301). The *Gravois* court held that Federal Courts have exclusive jurisdiction with respect to personal injury and death actions arising as a result of activities on fixed platforms on the Outer Continental Shelf.

Finally, the decision of the Court of Civil Appeals is in direct conflict with a number of Federal District Court cases holding that subject matter jurisdiction is exclusively federal in cases arising under the Lands Act. *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), *Borne v. Tenneco Oil Company*, 1973 A.M.C. 388 (E.D. La. 1972) and *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979).

The applicability of the Lands Act to plaintiff's personal injury action against Respondent and its contractual indemnity action against Petitioner was recognized by the Court of Civil Appeals, which also acknowledged that the Lands Act establishes the structure of remedies for fixed platform workers on the Outer Continental Shelf and substantively controls other disputes arising in the area governed by the Act, such as the subject contractual indemnity action. Consequently, the focus of Petitioner's disagreement with the Court of Civil Appeals is on the question of *exclusivity* of Federal Court subject matter jurisdiction over the remedies of workers such as the plaintiff and suits such as the contractual action brought by Respondent.

Although interpreting case law and secondary source material clearly reflect the exclusivity of Federal Court jurisdiction over matters pertaining to fixed platforms on the Outer Continental Shelf in the Gulf of Mexico, it is actually unnecessary to go further than the wording of the statute itself to find conclusively that the State Courts are without subject matter jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf. The opinion of the Court of Civil Appeals hinged on the

absence of the word "exclusive" in the statute's jurisdictional section, but exclusivity may also be established by fair implication and a reading of the statute as a whole leads inevitably to the conclusion that Congress intended federal sovereignty, federal policy, and federal law in the Lands Act area to be judicially governed exclusively by the Federal Courts.

Plaintiff's accident occurred on September 22, 1975, and suit was originally filed on November 20, 1975 (Tr. 2). The indemnity action was filed by Respondent on February 10, 1977 (Tr. 16). Thus, the statutory references pertinent to this question would be the provisions of the Lands Act as they appeared at those material times. The Lands Act was amended on September 18, 1978, but absolutely no change material to the question of the exclusivity of subject matter jurisdiction in the Federal Courts was effected. The Court of Civil Appeals' opinion noted that the word "original" was omitted from the statute's jurisdictional section by the 1978 amendments and attached significance to this omission. The absence of the word "original" from the current text lends no support to Respondent's position regarding exclusivity because a grant of "jurisdiction" is indistinguishable from one of "original jurisdiction" insofar as the Federal Trial Courts are concerned. To the contrary, in view of the fact that Congress was chargeable with knowledge of the pre-1978 case law holding subject matter jurisdiction exclusively in the Federal Courts, the failure of the 1978 amendments to the Lands Act to set forth a clear grant of concurrent jurisdiction, changing the existing law, militates in favor of Petitioner's position.

Section 1333 of Title 43 of the United States Code as it appeared at all times pertinent to this litigation,

had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon. Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

> "(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and sea bed of the Outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose."

Subsection (a) (1) provided that:

> "(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and sea bed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent *as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State:* Provided, however, that mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter." (Emphasis supplied).

Subsection (a)(2) declared, and as amended still declares, the civil and criminal laws of the adjacent states

to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon to the extent that they are applicable and not inconsistent with federal law and regulations.

The next to the last sentence of that subsection is particularly enlightening, as it provided, and still provides that:

> "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States."

If further indicia of the exclusivity of federal jurisdiction over cases and controversies arising out of or in connection with operations conducted on the Outer Continental Shelf is required, subsection (a)(3) of Section 1333 should resolve any doubts. That subsection provided, and continues to provide that:

> "(a)(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the sea bed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom."

Finally, the policy of the United States with respect to its exercise of jurisdiction over the subsoil and seabed of the Outer Continental Shelf is clearly set forth in 43 U.S.C. § 1332 (Supp. 1979), and this, in conjunction with the other expressions of exclusive federal jurisdiction found in the Act, works to clearly preclude State Court jurisdiction over such matters by fair implication.

As indicated above, the interpreting case law and secondary source material are uniformly supportive of the exclusivity of federal jurisdiction with respect to cases such as the one at bar. In an annotation found at 30 A.L.R. Fed. 535 (1976) concerning "Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. § 1333), Relating to Laws Applicable to the Subsoil and Sea Bed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon," the author states unequivocally in the summary and comment section (§ 2) that:

> "The Constitution and laws of the United States are made applicable to the Outer Continental Shelf (43 U.S.C.A. § 1333(a)(1)), and it has been held that federal law applies exclusively to these submerged lands . . . and that insofar as the Act gives United States District Courts 'original jurisdiction' over cases and controversies arising in connection with operations conducted on the Outer Continental Shelf (43 U.S.C.A. § 1333(b)), *such jurisdiction is exclusive, State Courts having no jurisdiction of the subject matter . . .*" (Emphasis supplied).

Discussed at length in the annotation is the case of *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F. Supp. 757 (E.D. La. 1972), which involved a suit arising out of a contract in which the plaintiff agreed to furnish certain equipment to the defendant for use in raising an oil drilling platform which had sunk to the floor of the Outer Continental Shelf as the result of hurricane damage. The action had originally been brought in a Louisiana State Court, but had been removed to Federal District Court by the defendant, where consideration was given to the plaintiff's motion to remand the case. District Judge

Alvin B. Rubin, a noted authority on admiralty and maritime matters and the rights of offshore oil workers, who has since been appointed to the Fifth Circuit Court of Appeals, analyzed the provisions of the Lands Act in great detail and held that exclusive jurisdiction over the subject matter of the action was vested in the United States District Court by the Act.

A subsequent case provides further support. In *Borne v. Tenneco Oil Company,* 1973 A.M.C. 388, 389 (E.D. La. 1972), it was held that the Lands Act "confers *exclusive* jurisdiction on the U. S. District Courts 'of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf . . .'" (Emphasis supplied).

Judge Ross N. Sterling of the United States District Court for the Southern District of Texas, Houston Division, has recently had occasion to consider the question of the exclusivity of Federal Court jurisdiction over claims arising out of accidents on fixed oil field platforms in the area governed by the Lands Act and has held that the Federal Courts have exclusive subject matter jurisdiction. *Friedrich v. Whittaker Corporation,* 467 F. Supp. 1012 (S.D. Tex. 1979).

Finally, although the precise question presented herein was not at issue, the decision of this Court in *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969) clearly reflects in its consideration of the history of the passage of the Lands Act that the intention of the Act was that it vest exclusive jurisdiction in the Federal Courts. Discussing the hearings held before the Senate Committee on Interior and Insular Affairs with respect to the applicability of maritime law to injuries occurring

on fixed structures on the Outer Continental Shelf, the Court noted as follows:

> "On the other hand, Federal enforcement of the law in this area was insisted upon by the Department of Justice, and there was substantial doubt whether State law and jurisdiction could or should be extended to these structures. A Federal solution was thought necessary." 395 U.S. 352, 364.

With respect to the compromise which emerged, the Court had these observations:

> "The administration's opposition to committing these areas solely to the jurisdiction of State Courts, state substantive law, and state law enforcement was recognized in that *the applicable law was made Federal law enforceable by Federal officials in Federal Courts.* But the special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families was also recognized by dropping the treatment of these structures as 'vessels' and instead, over the objections of the administration that these islands were not really located within a State, the bill was amended to treat them 'as if [they] were [in] an area of exclusive Federal jurisdiction located within a State.' *State law became Federal law federally enforced.*" 395 U.S. 352, 365. (Emphasis supplied).

Respondent's contractual indemnity action against Petitioner was dependent upon a finding of liability against Respondent with respect to the plaintiff's action. No such judgment rendered by the Trial Court could be valid as it lacked subject matter jurisdiction and, consequentiy, there was no predicate for the judgment of indemnity against Petitioner. Additionally, the third party action of

Respondent was, itself, dependent upon the Lands Act and, consequently, the Trial Court was similarly without subject matter jurisdiction over that action. Again, no valid judgment of indemnity could be rendered.

The absence of subject matter jurisdiction over plaintiff's personal injury case against Respondent and its contractual indemnity case against Petitioner constitutes fundamental error. The Trial Court should not have retained jurisdiction and it had no power to render the judgment of contractual indemnity in favor of Respondent. Both the Court of Civil Appeals and Supreme Court of Texas should have dismissed the case for want of jurisdiction and had no power to affirm the judgment. A Court that is without subject matter jurisdiction has no authority to render any judgment other than one of dismissal. *Southwestern Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976); *City of Beaumont v. West*, 484 S.W.2d 789 (Tex. Civ. App.—Beaumont 1972, writ ref. n.r.e.); and *Barnes v. Bituminous Casualty Corp.*, 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref. n.r.e.).

II.

CONFLICT WITH THE UNITED STATES SUPREME COURT

The Court of Civil Appeals held that the Trial Court committed no error in denying Petitioner's requested jury Instruction C, designed to make the jury aware that any award of damages would not be subject to federal income taxation. This decision is in direct conflict with this Court's holding in *Norfolk & Western Railway Company v. Liepelt*, 48 U.S.L.W. 4132 (Feb. 19, 1980). In *Liepelt*, this Court held that it was reversible error for the Trial

Court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested a similar, brief and easily understood instruction, which was refused.[1]

There is no question that Petitioner's requested Instruction C was submitted to the Trial Court for inclusion in the jury charge in a timely and appropriate fashion, but was refused (Tr. 198-199, 200-204). The Transcript reflects that all three requested instructions, A, B and C, were refused. The three instructions were stapled together in sequential order and the Judge signed the top one, A, to signify his refusal to submit them. The error was preserved by setting forth denial of requested Instruction C as a reason for granting a new trial (Tr. 281), and, of course, the point has been further preserved in the appeal to the Court of Civil Appeals and Application for Writ of Error to the Supreme Court of Texas.

Although the *Liepelt* case addressed the jury instruction issue in the context of a wrongful death action brought under the Federal Employer's Liability Act (FELA), the holding is clearly applicable in this case arising under the Lands Act.

---

1. Petitioner's requested Instruction C was as follows:
You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes (Tr. 199), and printed in Appendix B, *infra*, p. B-7.

The Court of Civil Appeals recognized the applicability of the Lands Act to plaintiff's personal injury action against Respondent and its contractual indemnity action against Petitioner. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court held that under the Lands Act the applicable law is federal law with the law of the state adjacent to the fixed platform in question to be utilized only to fill "gaps" in the controlling federal law. Central to the *Liepelt* holding is the established view that questions concerning the measure of damages in actions predicated on federally created rights are federal in character and governed by federal law even when the action is pending in State Court. Consequently, the law of the adjacent state in this case, Louisiana, and additionally, the law of the forum state, Texas, with respect to the requested jury instruction was irrelevant and the Trial Court should have given the requested instruction.

The *Liepelt* decision establishes the existence of federal law and policy on the question of such an instruction so that, under the Lands Act, reference to state law on the question was impermissible. That federal law and policy are expressed generally is clear as there can be no cogent reason for differentiating between such instructions in the context of actions brought under the FELA, the Lands Act, the Jones Act, or any of the other federal acts creating causes of action for personal injury. The evil addressed by this Court is the same in all of these areas and the remedy provided is well suited to all, as well.

Finally, it is also clear that the *Liepelt* rule of law is controlling in this matter even though the decision was handed down after the Trial Court's refusal of the requested instruction. In *Lang v. Texas & P. Ry. Co.*, 624

F.2d 1275 (5th Cir. 1980), the question of retroactive application of the *Liepelt* holding was addressed and the position that it should not be applied retroactively rejected. The Court found that retroactive application of the rule of law established in *Liepelt* would not result in "manifest injustice." A similar result was reached in *Cazad v. Chesapeake & Ohio Ry.*, 622 F.2d 72 (4th Cir. 1980), a case tried prior to *Liepelt*, but pending on appeal when *Liepelt* was decided, in which the Fourth Circuit reversed for failure to give a proffered instruction which was substantially identical to the instruction required in *Liepelt*.

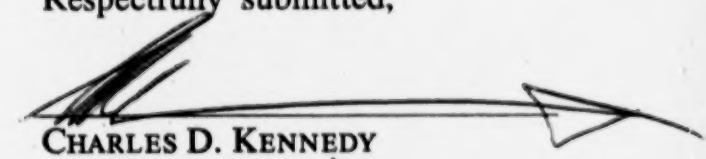
The *Liepelt* decision was brought to the attention of the Supreme Court of Texas by Supplemental Brief, but was evidently ignored. Petitioner's view is that suggestions of "manifest injustice" in applying *Liepelt* at this stage are not well taken. A greater injustice would be done in not applying that holding in light of the fact that Petitioner informed the Trial Court of the appropriate law and requested an appropriate instruction, the giving of which could not possibly have caused any harm. Petitioner is at a loss to explain what more it could have done to protect its rights in this regard.

Under these circumstances, this Court should do simple justice by granting the Petition for Writ of Certiorari and reversing the decision of the Court of Civil Appeals, mandating a new trial.

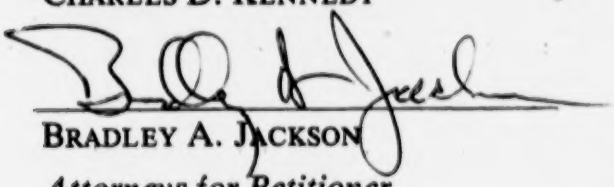
CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



CHARLES D. KENNEDY



BRADLEY A. JACKSON

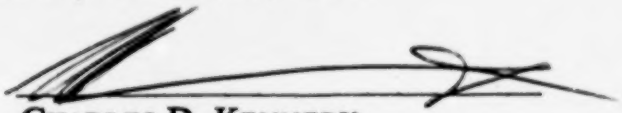
Attorneys for Petitioner

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, *i.e.*, on Respondent by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record as follows, Frank Caton, Esq., Crain, Caton, James and Womble, 3300 Two Houston Center, Houston, Texas 77002, and on the Plaintiff in the Trial Court by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record as follows, Joseph D. Jamail, Esq., Jamail & Kolius. 3300 One Allen Center, Houston, Texas 77002, this 14th day of October, 1980.



CHARLES D. KENNEDY

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

Court of Civil Appeals Opinion

No. B2159

Affirmed, and Opinion filed December 12, 1979.

GULF OFFSHORE COMPANY,
A Division of the Pool Company, Appellant

v.

MOBIL OIL CORPORATION, Appellee

Appeal from 129th District Court of Harris County

Appellant, Gulf Offshore Company, a Division of the Pool Company, appealed from a judgment for indemnity rendered in favor of appellee, Mobil Oil Corporation. Appellant Gulf Offshore was a third party defendant below and appellee Mobil was defendant and third party plaintiff. Steven Gaedecke was plaintiff in the trial court.

Steven Gaedecke, an employee of third party defendant-appellant Gulf Offshore, sued defendant-appellee Mobil, and L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc., for personal injuries sustained on a vessel owned by Levy and chartered by Mobil. Mobil later filed a third party complaint against Gulf Offshore, alleging liability for indemnity pursuant to certain provisions in the contract for well completion operations which was executed by Gulf Offshore as the contractor-indemnitor and Mobil as platform owner-indemnitee.

Prior to trial, plaintiff Gaedecke settled with the Levy defendants for a guaranteed recovery of $100,000.00 and proceeded to take a non-suit against them. Plaintiff also reached agreement with defendant Mobil, that if Mobil did not obtain indemnity from Gulf, plaintiff's recovery against Mobil would be limited to $200,000.00 plus the compensation lien. Also present in the trial court was intervenor, Employers' National Insurance Company.

On September 22, 1975, plaintiff Gaedecke was safely aboard the vessel Salton-Seahorse, having been evacuated pursuant to the implementation of Mobil's hurricane evacuation plan. Defendant Mobil had arranged for the vessel, owned and operated by Levy, to stand by for the evacuation. Following preparation for evacuation, all machinery was shut down, and after evacuation from the platform of all but two platform workers employed by Gulf Offshore by use of the crane, even its generator was shut off. As the last two workers, the crane operator and his helper, attempted to evacuate from the platform using a rope to swing onto the deck of the Salton-Seahorse, plaintiff heard some party yell down to him to go aft and provide assistance. A large wave washed across the aft area of the vessel where he had positioned himself and plaintiff was swept along the deck of the vessel and ended up against a pallet loaded with sand. Plaintiff Gaedecke suffered injuries primarily to his back.

At trial in response to special issues, the jury returned a verdict which found that defendant, Mobil Oil Corporation, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform and in the selection of the method used to evacuate the

crew from the platform; that such were a proximate cause of the plaintiff's injuries; that $900,000.00 would be a sum which would fairly and reasonably compensate plaintiff for injuries suffered; and that plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. The trial court entered judgment based on the jury's answers to the special issues and granted indemnity to Mobil from Gulf Offshore for $900,000.00 less the compensation lien of $32,712.09. Gulf Offshore appeals from the judgment of indemnity.

Defendant Mobil and third party defendant Gulf Offshore entered into contract number 1159, which concerned oil well completion operations to be performed by Gulf Offshore on defendant Mobil's platform wells situated in Grande Isle, Block 95, offshore of the State of Louisiana. Section 15 set out the provisions made concerning insurance and indemnity:

15. INSURANCE AND INDEMNITY:

15.1 At any and all times during the term of this agreement, Contractor agrees to maintain in force and submit evidence of insurance equal to or in excess of the requirements detailed in Exhibit B attached hereto and made a part hereof.

15.2 All insurance shall be carried in a company or companies acceptable to Mobil and shall be maintained in full force and effect during the term of this agreement, and shall not be canceled [sic], altered, or amended without ten (10) days prior written notice having first been furnished Mobil. Upon request Mobil shall be furnished certified copies of all such insurance policies.

15.3 In the event Contractor is a self-insurer and Mobil has consented to Contractor's being a self-

> insurer as to any one or more of the risks as to which coverage is required, evidence of such consent must be in writing and approved by a representative of Mobil authorized to enter into such consent agreement.
>
> 15.4 Contractor shall protect, indemnify and save Mobil Harmless against any and all claims, demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries or death, or damage to property occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees, and whether due to imperfection of any material furnished by Mobil, or the premises themselves or any equipment thereon, whether latent or patent, or for any other cause whatsoever; and for damages for infringement of any patent as more particularly set forth in Paragraph 23 hereof.

Appellant's first point of error addresses the threshold question of the jurisdiction of the courts of the State of Texas to entertain causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979). There is no dispute as to the applicability of the Outer Continental Shelf Lands Act to this case. 43 U.S.C.A. § 1333(a)(1) (1975), in effect at the time of this accident, states that:

> The Constitution and laws of civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached

> to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state.

The section of the Act in effect in this case, 43 U.S. C.A. § 1333(b) (1975), governing jurisdiction specifies that:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

We note that nowhere in this section does the word "exclusive" appear. Appellant argues that the Act vests exclusive jurisdiction of the subject matter of the plaintiff's main cause of action and the indemnity action in federal district court. We do not read 43 U.S.C.A. § 1333 (b) (1975) so as to oust our state courts of subject matter jurisdiction in this case.

No authoritative case law, either state of federal, has resolved the issue of the exclusivity of federal court jurisdiction over actions filed pursuant to the Outer Continental Shelf Lands Act. In *Fluor Ocean Services, Inc. v.*

Rucker Company, 341 F.Supp. 757 (E.D. La. 1972), and *Borne v. Tenneco Oil Company, et al.*, 1973 A.M.C. 388 (E.D. La. 1972), Judge Rubin held that the Act conferred exclusive jurisdiction on the U.S. district courts for causes of action arising out of operations conducted on the outer Continental Shelf and further held in *Fluor* that the intent of Congress was to make such operations subject to the exclusive control and jurisdiction of the federal government. We disagree for the reasons stated in the foregoing paragraph. We also note that in the penultimate paragraph of the opinion in *Fluor*, Judge Rubin merely found that the federal district court had original jurisdiction.

Judge Rubin wrote that as a matter of policy, ". . . in an area where the federal government had exerted exclusive sovereignty, such as the outer Continental Shelf, a single federal forum would be more appropriate than multiple state forums to decide disputes that arise there." *Fluor Ocean Services, Inc. v. Rucker Company, supra* at 760. We do not believe this to be necessarily so. The Act provides that the Constitution and laws of the United States govern the outer Continental Shelf, 43 U.S.C.A. § 1333(a)(1) (1975), and where applicable and not inconsistent with this Act or with federal laws, the laws of the adjacent state are declared to be the law of the United States regarding the outer Continental Shelf. 43 U.S.C.A. § 1333(a)(2) (1975). The end result would be an application of the same laws no matter where the forum was located, whether state of federal.

Following *Fluor* is the recent decision of *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979). Here Judge Sterling recognized that the holding in *Fluor*, which acknowledged that such jurisdiction was

original, did not necessarily include exclusive. Judge Sterling dismissed the case in *Friedrich* on other grounds, noting that a prompt authoritative resolution of the issue of original or exclusive jurisdiction by a federal appellate court would be welcomed. *Friedrich v. Whittaker Corporation, supra* at 1015. Nonetheless, *Friedrich* held that federal courts have exclusive jurisdiction over claims arising out of accidents on fixed oil rigs in areas covered by the Outer Continental Shelf Lands Act. *Id.* at 1014.

One Louisiana decision, *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. Ct. App.), *writ ref'd,* 247 La. 1016, 175 So.2d 301 (1965), has also faced the issue of the exclusivity of federal court jurisdiction under the Outer Continental Shelf Lands Act. The majority opinion, holding for exclusive federal court jurisdiction under the Act, drew a vigorous dissent. We follow the dissent in *Gravois* in two respects by holding that our state courts may take cognizance of an action asserted under this Act irrespective of the fact that the incident giving rise thereto occurred within the federally defined limits of the outer Continental Shelf, and secondly, that our state courts have jurisdiction to adjudicate plaintiff's claims irrespective of which law must be applied in the determination thereof. *Gravois v. Travelers Indemnity Company,* 173 So.2d at 556, 559.

43 U.S.C.A. § 1333(b) (1975) of the Outer Continental Shelf Lands Act was amended and renumbered in 1978 to 43 U.S.C.A. § 1349(b)(1) (1978) and now reads in pertinant part as follows:

> . . . the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation

> conducted on the outer Continental Shelf or which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

The word "original" was omitted in the 1978 version. We find this omission significant in that it further supports our holding that the Act neither intended nor required sole original or exclusive jurisdiction in the federal courts. Point of error one is overruled.

In its second point on appeal, appellant Gulf Offshore contends that its Motion for Judgment Non Obstante Veredicto was improperly overruled because the jury verdict upon which the judgment of indemnity in favor of defendant Mobil was predicated, was the product of fraud and collusion by attorneys for plaintiff and Mobil, and Mobil, therefore, is precluded from obtaining indemnity as a matter of law. A motion for judgment non obstante veredicto is proper ". . . if a directed verdict would have been proper . . ." TEX. R. CIV. P. 301.

In determining whether the trial court erred in refusing to grant a motion for judgment notwithstanding the verdict, the inquiry is whether there is any evidence of probative force to support the verdict of the jury. *City of San Augustine v. Roy W. Green Company,* 548 S.W. 2d 467, 472 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In determining whether there is any evidence of probative force to support the verdict, we are required

to view the evidence in the light most favorable to the party against whom the motion is sought and every reasonable intendment deducible from the evidence is to be indulged in that party's favor. *Id.* at 472.

Based on the record, we fail to see how the jury's verdict in the instant case could be construed to be the product of fraud and collusion between counsel for plaintiff and counsel for Mobil. All parties were represented in trial by highly competent attorneys; all the agreements, the legality of which is uncontested, were disclosed prior to trial in the presence of the trial judge and duly recorded by the court reporter. Counsel for appellant Gulf Offshore was given ample opportunity to question the attorneys for the plaintiff and appellee Mobil at that time.

Attorneys engaged in the trial of cases have heavy responsibilities, and must have latitude in making tactical decisions as how to best represent their clients within the bounds of propriety. *General Motors Corporation v. Hebert,* 501 S.W.2d 950, 957 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). Under these facts, where appellee Mobil was unable to reach agreement with appellant Gulf Offshore on the issue of indemnity, it is understandable that counsel for Mobil would cooperate with counsel for plaintiff to limit Mobil's potential liability in the event Mobil did not obtain indemnity from Gulf Offshore. Point of error two is overruled.

Points of error three, four, five and six complain of the lack of evidence to support the judgment for contractual indemnity given the language in Section 15.4 of the contract. Section 15.4 states in pertinent part:

> Contractor [Gulf Offshore] shall protect, indemnify and save Mobil Harmless against any and all claims,

> demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries . . . occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees . . .

Appellant Gulf Offshore contends that the plaintiff's injuries were not incident to or the result of Gulf Offshore's work to be performed under the contract with Mobil.

We find sufficient evidence in the record to support the jury's answer to special issue four which inquired whether or not plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. Plaintiff's own testimony that it was the normal thing to do to assist the last two Gulf Offshore employees off the platform even though an evacuation was in progress and that it was customary to help other Gulf Offshore employees in the regular course of their work was uncontroverted. The evidence elicited regarding the work operations on the platform justifies the jury's answer that the injuries suffered by the plaintiff were incident to, or resulting directly or indirectly from the work required. These points of error are overruled.

In points of error seven, eight and nine, appellant Gulf Offshore contends that Louisiana law, applied as controlling federal law in this case, and Texas law prohibit contractual indemnity between an oil company and a contractor unless there is insurance coverage or alternatively, that any liability for indemnity should be limited

to the amount of insurance required by the contract. Furthermore, appellant by relying on TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) urges that the public policy of the State of Texas prohibits contractual indemnity unless covered by insurance and then only to a maximum ceiling of $300,000.00.

43 U.S.C.A. § 1333 (a)(2) (1975), in effect at the time of this accident, states that:

> To the extent that they are applicable and not inconsistent with the subchapter [Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979)] or with other federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States . . .

It is clear to this court that federal law, and decisions interpreting those laws, apply in this instance, and where there are no such laws or decisions, this court shall apply the laws and decisions of the State of Louisiana. The Outer Continental Shelf Lands Act makes it clear that federal law, supplemented by state law of the adjacent state, when not inconsistent with applicable federal law,

is to be applied to drilling rigs as artificial islands as though they were federal enclaves in an upland state. *Rodrique v. Aetna Casualty and Surety Company*, 395 U.S. 353, 355 (1969). It is evident that federal law is exclusive in its regulation of this area, and that state law is adopted only as surrogate federal law. *Id.* at 357.

In *Day v. Ocean Drilling and Exploration Company*, 353 F. Supp. 1350 (E.D. La. 1973), a motion for summary judgment was presented to the federal district court regarding interpretation of a contract containing an indemnity agreement similar to the one in our case. The contract before that court provided minimum limits of $300,000.00 for insurance coverage of contractual liabilities and indemnities assumed by the contractor covering all claims "incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents . . . or in connection with the work to be performed, services to be rendered, or materials to be furnished, under this contract . . ." *Id.* at 1351.

Plaintiff Day was working on a fixed platform located on the outer Continental Shelf. As he passed by a compressor, it suddenly exploded, injuring him.

Louisiana law was applied in *Day* as surrogate federal law to interpret the contract. The court held that while Louisiana courts have read such an indemnity agreement narrowly, the agreement must be given effect according to the intention of the parties. *Id.* at 1352. Judge Rubin did not limit his interpretation to any one of the phrases in the indemnity agreement, e.g. "arising out of" and "in connection with." Instead, taking the contract as a whole, the court held that it was the intention of the parties to require indemnity against all risks of harm with insurance

coverage and that such an indemnity agreement would be upheld.

We disagree with respect to the position taken by appellant Gulf Offshore that indemnity agreements are not enforceable under Louisiana law without insurance coverage. This issue was not reached in *Day* as insurance coverage was undisputedly provided pursuant to the contract in that case. In the two cases cited by appellant, *Dickerson v. Continental Oil Company,* 449 F.2d 1209 (5th Cir. 1971), and *Hicks v. Ocean Drilling and Exploration Company,* 512 F.2d 817 (5th Cir. 1975), the limits of liability for the indemnitors in both cases were limited to the amounts of insurance coverage provided in the respective contracts. Unlike the facts before us, in neither case was there any dispute as to the limits of liability contracted for or that insurance coverage was in fact obtained.

The record in this case does not reflect any proof as to the existence of insurance obtained to protect against the risks assumed by appellant Gulf Offshore or any limits of liability agreed to by the parties in their contract. During the trial, appellee Mobil tendered into evidence certain documents identified as the contract executed by appellant Gulf Offshore and appellee Mobil, without any objections from appellant Gulf Offshore.

Later, appellant Gulf Offshore discovered an Exhibit B was unattached to the contract admitted into evidence. In a post-trial proceeding, appellant sought to have the exhibit made a part of the record. The unattached exhibit allegedly stated what the limits of liability were. Having made no objection to the offer of the contract at trial, appellant has waived any complaint concerning the ex-

clusion of the exhibit. The trial court in the post-trial proceeding properly excluded the exhibit from the record since it was evidence on a controversial matter. *State v. Harrington,* 407 S.W.2d 467 (Tex. 1966), *cert. den.,* 386 U.S. 944 (1967); TEX. R. CIV. P. 270. For these reasons, we overrule as well appellant's alternative assertion that its liability for contractual indemnity should be limited to $100,000.00, that being the limit of liability allegedly required by the contract.

TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) declares indemnity provisions in agreements pertaining to wells for oil, gas, or water, or mines for other minerals, where there is negligence attributable to the indemnitee, void and unenforceable as against the public policy of the State of Texas, except if the parties agree in writing, that such indemnity obligation will be supported by liability insurance furnished by indemnitor, and then only to the limits of insurance agreed to be furnished.

We hold that this provision has no application to the instant case. Applying federal law pursuant to the Outer Continental Shelf Lands Act and Louisiana law as surrogate federal law, where not inconsistent with federal law, the indemnity agreement in this case does not fail as against the public policy of the State of Louisiana irrespective of the existence or non-existence of insurance. *Hicks v. Ocean Drilling and Exploration Company,* 512 F.2d at 826; *Dickerson v. Continental Oil Company,* 449 F.2d at 1221. Following Justice Guittard in *Mamlin v. Susan Thomas, Incorporated,* 490 S.W.2d 634, 636-37 (Tex. Civ. App.—Dallas 1973, no writ), we hold that the Texas concept of public policy cannot prevail against the national policy enunciated in a federal act as declared

by Congress in matters within its power. Points of error seven, eight and nine are overruled.

Appellant Gulf Offshore next urges error in the alignment of parties prior to the assignment of peremptory challenges and in the failure to equalize the challenges among the parties, thereby depriving appellant of a fair trial. Plaintiff Gaedecke was awarded twelve peremptory challenges and appellant Gulf Offshore and appellee Mobil were each awarded six peremptory challenges.

The granting of peremptory challenges depends on whether the interests of the parties within the meaning of TEX. R. CIV. P. 233 are, at least in part, antagonistic in a matter that the jury is to be concerned with. *Perkins v. Freeman,* 518 S.W.2d 532 (Tex. 1974). TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979) requires the trial court, after alignment of the parties, to equalize the number of peremptory challenges.

The record on appeal consists of a partial statement of facts, the jury voir dire having been omitted. Antagonism between plaintiff and appellee Mobil was shown by the pleadings and none of the pre-trial concessions changed that. The record does not reflect in any manner how appellant was injured by the jury selection process.

Appellant assigns as error the refusal of four requested special issues which inquire about appellee Mobil's negligence as vessel-charterer of the Salton-Seahorse. Appellant contends that favorable answers to these special issues could have established the negligence of Mobil as vessel-charterer being the sole cause of plaintiff's injuries, thereby precluding contractual indemnity against appellant Gulf Offshore. 33 U.S.C.A. § 905 (b) (1978) precludes liability of an employer by agreement directly or in-

directly for injuries to an employee caused by the negligence of a vessel.

We do not find any evidence in the record nor do the pleadings reveal that the issue of sole cause was raised. TEX. R. CIV. P. 279 requires that when a case is submitted upon special issues, only those controlling issues made by the written pleadings and the evidence shall be submitted. There was evidence from which the jury could have found appellee Mobil negligent as a fixed platform operator or as a vessel-charterer. Given the jury's answers to the special issue actually submitted, finding Mobil negligent in the capacity as fixed platform operator, the result would not have changed. We find no error in the refusal to submit the requested issues.

In its last three points of error, appellant attacks the refusal to submit tendered instructions prohibiting consideration by the jury of inflationary trends or increases in productivity as factors affecting awards for future wage loss, the inapplicability of federal income taxes and the reduction of any future damage award to present value by the use of an appropriate interest rate prevailing at time of trial.

The trial court properly refused to permit the jury from considering evidence as to inflationary trends as an element of damages for future wage loss. *Davis v. Hill Engineering Company,* 549 F.2d 314 (5th Cir. 1977); *Johnson v. Penrod Drilling Company,* 510 F.2d 234 (5th Cir.) (en banc), *cert. den.,* 423 U.S. 839 (1975). Increases in productivity were not proper for consideration by the jury. *Davis v. Hill Engineering Company,* 549 F.2d at 335. *Davis, Johnson,* and another case cited by appellant, *Blue v. Western Railway of Alabama,* 469 F.2d 487 (5th Cir. 1972), *cert. den.,* 410 U.S. 956

(1973), do not hold that appellant would be entitled to an affirmative instruction prohibiting the jury's consideration of these factors. Furthermore, the record before us gives no indication that the jury in fact considered inflationary trends or increases in productivity in calculating the damages award.

Johnson v. Penrod Drilling Company, 510 F.2d at 236-37, specifically prohibits consideration by the jury by evidence or instruction, of the impact of income taxes in the calculation of a proper award for loss of future wages.

Davis, Johnson and *Blue* permit a trial court to admit evidence pertaining to the reduction of the award for future damages, to present value by the use of an appropriate interest rate prevailing at the time and place of trial. We hold that this was adequately provided for in the damage issue which was actually submitted and which inquired: "What sum of money, if any, if paid now cash . . . ." would reasonably compensate plaintiff Gaedecke. *Davis, Johnson,* and *Blue* do not hold that appellant would be entitled to an instruction solely directing the jury to apply an appropriate interest rate to reduce to present value any sum awarded for future damages. Points of error twelve, thirteen and fourteen are overruled.

Having carefully reviewed all the points of error and the authorities cited in the briefs, we accordingly affirm the judgment of the trial court.

/s/ Felix Salazar, Jr.
Justice

Judgment rendered, and Opinion filed December 12, 1979.

Panel consists of Associate Justices Coulson, Salazar and Junell.

Court of Civil Appeals

JUDGMENT

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY
VS. NO. B2159
MOBIL OIL CORPORATION, ET AL

"This cause, being an appeal from the judgment rendered by the court below and entered on December 28, 1978, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellant, Gulf Offshore Company, a division of the Pool Company, and its surety, Western Surety Company, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

COURT OF CIVIL APPEALS
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

January 9, 1980

Hon. Charles D. Kennedy
Hon. Bradley A. Jackson
Royston, Rayzor, Vickery & Williams
Suite 3710
One Shell Plaza
Houston, Texas 77002

Hon. Frank Caton
Hon. Gary L. Marks
Crain, Caton, James & Oberwetter
3300 Two Houston Center
Houston, Texas 77002

Hon. Joseph D. Jamail
Hon. Gus Kolius
Hon. John B. Neibel
Hon. Nat B. King
Jamail & Kolius
3300 One Allen Center
Smith at Dallas Streets
Houston, Texas 77002

Re: B2159—Gulf Offshore Company, a division of the Pool Company v. Mobil Corporation, et al, from Harris

Gentlemen:

Please be advised that on this date in the above cause the Court OVERRULED appellant's motion for rehearing.

Also, please be advised that application for writ of error, if any, must be submitted on or before Friday, February 8, 1980.

Respectfully,

/s/ THELMA MUELLER
Thelma Mueller, Clerk

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

June 18, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9169, GULF OFFSHORE CO., A DIVISION OF THE POOL COMPANY v. MOBIL OIL CORPORATION ET AL was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

July 16, 1980

Dear Sir:

You are herby notified that the Motion for Rehearing in the case of B-9169, Gulf Offshore Company

v.

Mobil Oil Corp et al.

was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON, Clerk

JUDGMENT ENTERED: Volume 1655, Page 767, General Minutes District Courts, in and for Harris County, Texas.

NO. 1,052,262

In The
DISTRICT COURT OF HARRIS COUNTY, TEXAS
129th Judicial District

STEVEN GAEDECKE

v.

MOBIL OIL CORPORATION, ET AL

v.

GULF OFFSHORE CO.,
A Division of the Pool Company

JUDGMENT

BE IT REMEMBERED that on the 20th day of November, 1978, came on to be heard the above styled and numbered cause, wherein Steven Gaedecke is Plaintiff, Mobil Oil Corporation, Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. are Defendants, and Mobil Oil Corporation is Third-Party Plaintiff, and Gulf Offshore Co., A Division of the Pool Company is Third-Party Defendant, and Employers' National Insurance Company is Intervenor, and came the parties Plaintiff, Defendants, Third-Party Plaintiff, Third-Party Defendant and Intervenor, and announced ready for trial. Prior to the voir dire examination of the jury panel, Plaintiff, in open court, took a voluntary non-suit as to Defendants Arthur Levy Boat Company, Arthur Levy, Inc.,

and Offshore Crews, Inc., and the Court having noted said Non-Suit did by its Order dismiss the Defendants Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. only. And came the jury consisting of twelve good and lawful men and women consisting of Catherine Mary Byrnes and eleven others who being duly empaneled and sworn and having heard the pleadings, evidence, stipulations and arguments of counsel, did on the 22nd day of November, 1978, return in open court their verdict as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Mobil Oil Corporation, at the time in question and under the circumstances existing, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in one or both of the following:

1. In waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform in question?

   To which the jury answered "yes".

2. In the selecting of the method used to evacuate Steven Gaedecke's crew from the platform?

   To which the jury answered "yes".

If you have answered "yes" to either parts of Special Issue No. 1, and only in that event, then answer

SPECIAL ISSUE NO. 2

Was such a proximate cause of the injuries suffered by Steven Gaedecke?

To which the jury answered "yes".

SPECIAL ISSUE NO. 3

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Steven Gaedecke as a direct and natural result of the injuries he received in the incident in question.

You will consider the following elements of damage, if any, and none other:

(a) Loss of earnings which he has sustained in the past;

(b) Loss of earning capacity which in reasonable probability he will sustain in the future;

(c) Physical pain and mental anguish which he has suffered in the past;

(d) Physical pain and mental anguish which in reasonable probability he will suffer in the future;

(e) Physical impairment he has sustained in the past;

(f) Physical impairment which in reasonable probability he will sustain in the future.

Answer in dollars and cents, if any.

To which the jury answered "$900,000.00".

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Steven Gaedecke's injuries were incident to, or resulted directly or indirectly from the work to be performed by Gulf Offshore Company under its contract with Mobil?

To which the jury answered "yes".

Catherine Mary Byrnes

Verdict of the jury was received by the Court and filed and entered of record on the minutes of the Court, and the Court having considered the pleadings on file herein, the verdict of the jury, the stipulations of the parties and the proof adduced, and having considered Plaintiff's Motion for Judgment, the Court is of the opinion that Plaintiff is entitled to have and recover of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of entry of the Judgment until paid;

The Court is further of the opinion that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company should have and recover the sum of $32,712.09;

The Court is further of the opinion that Plaintiff should have and take nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

The Court is further of the opinion that Third-Party Plaintiff Mobil Oil Corporation is entitled to and is granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay to Plaintiff by the terms of this Judgment;

The Court having further heard arguments and having read the briefs is of the opinion that the Law of Louisiana does apply and hereby applies such law in this action;

It is therefore,

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Steven Gaedecke do have and recover

of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of the entry of Judgment until paid;

ORDERED, ADJUDGED and DECREED by the Court that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company do have and recover the sum of $32,712.09;

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff has and takes nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

ORDERED, ADJUDGED and DECREED by the Court that Third-Party Plaintiff Mobil Oil Corporation is hereby granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay by the terms of this Judgment;

ORDERED, ADJUDGED and DECREED that all costs of court accrued herein be and are taxed against the Defendant Mobil Oil Corporation for which execution may issue with same if not timely paid.

All relief not granted herein is denied.

SIGNED, RENDERED and ENTERED this 18th day of December, 1978.

/s/ THOMAS J. STOVALL, JR.
Judge Presiding

APPROVED AS TO FORM ONLY:

JAMAIL AND KOLIUS

_____

Attorneys for Plaintiff

FULBRIGHT AND JAWORSKI

_____

Attorneys for Intervenor,
Employers' National Insurance Company

CRAIN, CATON, JAMES & OBERWETTER

_____

Attorneys for Defendant-Third-Party
Plaintiff, Mobil Oil Corporation

ROYSTON, RAYZOR, VICKERY & WILLIAMS

_____

Attorneys for Third-Party Defendant,
Gulf Offshore Company, a Division of
the Pool Company

BAKER AND BOTTS

_____

Attorneys for Defendants, Arthur
Levy Boat Company, Arthur Levy, Inc.
and Offshore Crews, Inc.

APPENDIX B

RAISING THE FEDERAL QUESTIONS PRESENTED

B-1

FIRST AMENDED ANSWER OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY.
Filed: September 8, 1978. RAY HARDY, District Clerk, Harris County, Texas. By M. Stuckey, Deputy.

NO. 1,052,262

STEVEN GAEDECKE

VS.

MOBIL OIL CORPORATION, L. A. LEVY, INC., and ARTHUR LEVY BOAT SERVICE, INC.

VS.

GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

In the District Court of Harris County, Texas
215th Judicial District

FIRST AMENDED ANSWER OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

To the Honorable Judge of Said Court:

Now comes GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY, Third Party De-

fendant in the above numbered and styled cause of action, and makes this its First Amended Answer to the Third Party Petition of Mobil Oil Corporation, and would respectfully show as follows:

I.

By way of special exceptions, Third Party Defendant would respectfully show as follows:

(a) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant within the subject matter jurisdiction of this Court because exclusive original jurisdiction of the subject matter of the Third Party Plaintiff's cause of action is vested in the United States District Court by virtue of the provisions of the Outer Continental Shelf Lands Act, 46 U.S.C. § 1331, *et seq.*;

(b) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant and should therefore be dismissed with prejudice;

(c) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant because Defendant is Plaintiff's employer and the provisions of the Longshoremen's & Harbor Workers' Compensation Act and the Outer Continental Shelf Lands Act prohibit Third Party Plaintiff from seeking indemnity from Third Party Defendant;

(d) Third Party Defendant specially excepts to Paragraph 5 of the Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant "because of the negligence" of Third Party Defend-

ant, said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted negligence, and said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(e) Third Party Defendant specially excepts to Paragraph 5 of Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant because of Third Party Defendant's "breach of its warranty of workmanlike performance", said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted a "breach of its warranty of workmanlike performance", and said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(f) Third Party Defendant specially excepts to Paragraph 5 of Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant because of Third Party Defendant's "breach of the terms of the aforementioned Drilling Contract", said allegeations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted a "breach of the terms of the aforementioned Drilling Contract, and

said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(g) Third Party Defendant specially excepts to Third Party Plaintiff's allegations that it is entitled to indemnity because of Third Party Defendant's "breach of the terms of the aforementioned contract" said allegations being untrue on their face in that Plaintiff has alleged that he was injured while onboard a vessel owned by another Defendant and not "while engaged in operations pursuant to a Drilling Contract entered into between Third Party Plaintiff Mobil Oil Corporation and Third Party Defendant Gulf Offshore Company, A Division of the Pool Company."

Of which special exceptions, each being taken separately and apart from each other, Third Party Defendant prays judgment of the Court together with costs.

II.

Without waiving the foregoing special exceptions, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant denies each and every, all and singular, the allegations contained within the Third Party Petition and demands strict proof thereof.

III.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that if Plaintiff were injured as

alleged, such injuries would be due solely to the Plaintiff's own negligent acts and omissions or were directly and proximately contributed to by Plaintiff's negligence, or, alternatively, were due to an unavoidable accident.

IV.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that if Plaintiff were injured as alleged, such injuries were caused in whole or in part by the negligent acts and omissions of a third party or were directly and proximately contributed to by the acts and/or omissions of a third person for whom Third Party Defendant is not responsible.

V.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that it was the employer of Plaintiff and under the Outer Continental Shelf Lands Act and Longshoremen's & Harbor Workers' Compensation Act, Third Party Plaintiff is not entitled to seek indemnity from Plaintiff's employer.

WHEREFORE, PREMISES CONSIDERED, Third Party Defendant prays that upon trial hereof, Third Party Plaintiff take nothing and that Third Party Defendant go hence without day, with its costs and such other and further relief as it may be entitled to receive.

ROYSTON, RAYZOR, VICKERY & WILLIAMS

By /s/ CHARLES D. KENNEDY
Charles D. Kennedy
Suite 3710
One Shell Plaza
Houston, Texas 77002
713/224-8380
Attorneys for Third Party Defendant

CERTIFICATE OF SERVICE

I certify that a true and copy of the First Amended Answer of Third Party Defendant has been mailed to attorneys for Third Party Plaintiff, Frank Caton, 3300 Two Houston Center, Houston, Texas 77002, and to Plaintiff's attorney, Gus Kolius, 3300 One Allen Center, Houston, Texas 77002, and to attorneys for Levy Boat Service, Inc., Joseph D. Cheavens, Baker & Botts, One Shell Plaza, Houston, Texas 77002, on this 8th day of September, 1978.

/s/ W. C. QUILLIN
Of Royston, Rayzor, Vickery & Williams

B-7

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTION C

Filed: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By R. Trinkle, Deputy.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

JOINT APPENDIX

CHARLES D. KENNEDY
BRADLEY A. JACKSON
ROYSTON, RAYZOR, VICKERY & WILLIAMS
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

Counsel for Petitioner

FRANK CATON
CRAIN, CATON, JAMES & WOMBLE
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Counsel for Respondent Mobil Oil Corporation

JOSEPH D. JAMAIL
JAMAIL, KOLIUS & MITHOFF
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Counsel for Respondent Steven Gaedecke

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

Petition for Certiorari filed October 14, 1980.

Certiorari Granted December 8, 1980.

TABLE OF CONTENTS

	Page
Chronological List of Important Dates (Substitute for Docket Entries)	1
First Amended Answer of Third Party Defendant Gulf Offshore Company, A Division of the Pool Company	5
Requested Jury Instructions A, B & C of Third Party Defendant Gulf Offshore Company, A Division of the Pool Company	11
Trial Court Judgment	13
Court of Civil Appeals Opinion	19
Court of Civil Appeals Judgment	37
Court of Civil Appeals Notice of Overruling of Motion for Rehearing	38
Supreme Court of Texas Notice of Refusal of Application for Writ of Error	40
Supreme Court of Texas Notice of Overruling of Motion for Rehearing	41

CHRONOLOGICAL LIST OF IMPORTANT DATES (SUBSTITUTE FOR DOCKET ENTRIES*)

11/20/1975	Plaintiff Gaedecke's Original Petition filed.
12/26/1975	Original Answer of Defendant Mobil Oil Corporation filed.
1/ 8/1976	Original Answer of Defendants L.A. Levy, Inc., and Arthur Levy Boat Service, Inc., filed.
2/10/1977	Motion of Defendant Mobil Oil Corporation for Leave to File Third Party Complaint and Third Party Complaint of Defendant Mobil Oil Corporation filed.
2/16/1977	Motion of Defendant Mobil Oil Corporation for Leave to file Third Party Complaint granted.
3/28/1977	Answer of Third Party Defendant Gulf Offshore Company, a Division of the Pool Company filed.
9/ 8/1978	Plaintiff Gaedecke's First Amended Original Petition filed.
	First Amended Answer of Third Party Defendant Gulf Offshore Company, a Division of the Pool Company filed.
9/18/1978	Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's special exception as to jurisdiction over the subject matter overruled.
9/21/1978	First Amended Third Party Compaint of Defendant Mobil Oil Corporation filed.
10/ 6/1978	Original Answer of Defendant Offshore Crews, Inc. filed.

* Prepared by counsel for Petitioner and approved by all other counsel of record. Rule 30.1; Memorandum Re Printing Joint Appendix 4.

10/ 6/1978 Motion for Summary Judgment of Third Party Defendant Gulf Offshore Company, a Division of the Pool Company filed.

11/ 6/1978 Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Motion for Summary Judgment overruled.

11/ 9/1978 Defendant Mobil Oil Corporation's First Supplemental Answer filed.

Motion of Defendant Mobil Oil Corporation regarding Rule 184A filed.

11/20/1978 Case called for trial.

Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's renewed motion to dismiss for want of subject matter jurisdiction denied.

Plaintiff Gaedecke's Motion to take a Non-Suit as to Defendants L.A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. granted.

11/22/1978 Evidence concluded, all parties rested.

Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Motion for Instructed Verdict on ground of lack of subject matter jurisdiction overruled.

Charge to Jury prepared.

Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Requested Jury Instructions A, B and C filed.

Jury returned verdict, which received, announced and filed by the Court.

11/27/1978	Plaintiff Gaedecke's Motion for Judgment filed.
12/13/1978	Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Motion for Judgment Non Obstante Veredicto filed.
12/18/1978	Defendant Mobil Oil Corporation's Motion for Judgment filed.
	Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Motion for Judgment Non Obstante Veredicto overruled.
	Judgment entered.
12/28/1978	Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Original Motion for New Trial filed.
1/17/1979	Amended Motion for New Trial of Third Party Defendant Gulf Offshore Company, a Division of the Pool Company filed.
2/13/1979	Order Overruling Third Party Defendant Gulf Offshore Company, a Division of the Pool Company's Amended Motion for New Trial entered.
3/15/1979	Appeal Bond filed.
4/16/1979	Appeal docketed in the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas upon filing of the record consisting of the Transcript (2 volumes) and the Statement of Facts (4 volumes and 1 folder of exhibits).
12/12/1979	Judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas entered.

12/27/1979	Motion for Rehearing in Court of Civil Appeals filed.
1/ 9/1980	Motion for Rehearing in Court of Civil Appeals overruled.
2/ 8/1980	Application to the Supreme Court of Texas for Writ of Error filed.
6/18/1980	Application for Writ of Error refused by the Supreme Court of Texas with the notation "No Reversible Error".
7/ 3/1980	Motion for Rehearing in the Supreme Court of Texas filed.
7/16/1980	Motion for Rehearing in the Supreme Court of Texas overruled.

FIRST AMENDED ANSWER OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY.

Filed: September 8, 1978. Ray Hardy, District Clerk, Harris County, Texas. By M. Stuckey, Deputy.

[Transcript, pp. 38-42]

NO. 1,052,262

In The
DISTRICT COURT OF HARRIS COUNTY, TEXAS
215th Judicial District

STEVEN GAEDECKE

v.

MOBIL OIL CORPORATION, L. A. LEVY, INC. and ARTHUR LEVY BOAT SERVICE, INC.

v.

GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

FIRST AMENDED ANSWER OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

To the Honorable Judge of Said Court:

Now comes GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY, Third Party Defendant in the above numbered and styled cause of action, and makes this its First Amended Answer to the Third Party Petition of Mobil Oil Corporation, and would respectfully show as follows:

I.

By way of special exceptions, Third Party Defendant would respectfully show as follows:

(a) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant within the subject matter jurisdiction of this Court because exclusive original jurisdiction of the subject matter of the Third Party Plaintiff's cause of action is vested in the United States District Court by virtue of the provisions of the Outer Continental Shelf Lands Act, 46 U.S.C. § 1331, *et seq.*;

(b) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant and should therefore be dismissed with prejudice;

(c) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant because Defendant is Plaintiff's employer and the provisions of the Longshoremen's & Harbor Workers' Compensation Act and the Outer Continental Shelf Lands Act prohibit Third Party Plaintiff from seeking indemnity from Third Party Defendant;

(d) Third Party Defendant specially excepts to Paragraph 5 of the Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant "because of the negligence" of Third Party Defendant, said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted negligence, and said allegations are, therefore, conclu-

sions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(e) Third Party Defendant specially excepts to Paragraph 5 of Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant because of Third Party Defendant's "breach of its warranty of workmanlike performance", said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted a "breach of its warranty of workmanlike performance", and said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(f) Third Party Defendant specially excepts to Paragraph 5 of Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant because of Third Party Defendant's "breach of the terms of the aforementioned Drilling Contract", said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted a "breach of the terms of the aforementioned Drilling Contract," and said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(g) Third Party Defendant specially excepts to Third Party Plaintiff's allegations that it is entitled to indemnity because of Third Party Defendant's "breach of the terms of the aforementioned contract" said allegations being untrue on their face in that Plaintiff has alleged that he was injured while on-board a vessel owned by another Defendant and not "while engaged in operations pursuant to a Drilling Contract entered into between Third Party Plaintiff Mobil Oil Corporation and Third Party Defendant Gulf Offshore Company, A Division of the Pool Company."

Of which special exceptions, each being taken separately and apart from each other, Third Party Defendant prays judgment of the Court together with costs.

II.

Without waiving the foregoing special exceptions, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant denies each and every, all and singular, the allegations contained within the Third Party Petition and demands strict proof thereof.

III.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that if Plaintiff were injured as alleged, such injuries would be due solely to the Plaintiff's own negligent acts and omissions or were directly and

proximately contributed to by Plaintiff's negligence, or, alternatively, were due to an unavoidable accident.

IV.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that if Plaintiff were injured as alleged, such injuries were caused in whole or in part by the negligent acts and omissions of a third party or were directly and proximately contributed to by the acts and/or omissions of a third person for whom Third Party Defendant is not responsible.

V.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that it was the employer of Plaintiff and under the Outer Continental Shelf Lands Act and Longshoremen's & Harbor Workers' Compensation Act, Third Party Plaintiff is not entitled to seek indemnity from Plaintiff's employer.

WHEREFORE, PREMISES CONSIDERED, Third Party Defendant prays that upon trial hereof, Third Party Plaintiff take nothing and that Third Party Defendant go hence without day, with its costs and such other and further relief as it may be entitled to receive.

ROYSTON, RAYZOR, VICKERY & WILLIAMS

By /s/ CHARLES D. KENNEDY
Charles D. Kennedy
Suite 3710
One Shell Plaza
Houston, Texas 77002
713/224-8380
Attorneys for Third Party Defendant

CERTIFICATE OF SERVICE

I certify that a true and copy of the First Amended Answer of Third Party Defendant has been mailed to attorneys for Third Party Plaintiff, Frank Caton, 3300 Two Houston Center, Houston, Texas 77002, and to Plaintiff's attorney, Gus Kolius, 3300 One Allen Center, Houston, Texas 77002, and to attorneys for Levy Boat Service, Inc., Joseph D. Cheavens, Baker & Botts, One Shell Plaza, Houston, Texas 77002, on this 8th day of September, 1978.

/s/ W. C. QUILLIN
Of Royston, Rayzor, Vickery & Williams

REQUESTED JURY INSTRUCTIONS A, B AND C OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY.

Filed: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By R. Trinkle, Deputy.

[Transcript, pp. 198-199]

In The
DISTRICT COURT OF HARRIS COUNTY, TEXAS
129th Judicial District

Requested Instruction No. A

In connection with the damage issues, you are instructed that any amounts allowed for:

a) physical pain and mental anguish in the future, and

b) loss of earning capacity in the future, and

c) loss of physical capacity in the future, and

d) medical and hospital care in the future,

must be such amounts as are the present value thereof, and reduced to such present value by the use of an appropriate interest rate, prevailing at the time and place of trial, at which money can be safely and securely invested, and the balance shall be your answer.

Judge

REQUESTED INSTRUCTION NO. B

In considering the issues submitted by the Court dealing with the question of amount of damages sustained by Stephen Gaedecke, if any, you are instructed that you are not to consider or speculate concerning future inflationary trends or possible future increases in earnings due to increases in productivity, that is you shall not speculate in projection of future damages, if any, about possible future inflationary trends or possible depressions or about possible future wage increases.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.

TRIAL COURT JUDGMENT

Judgment Entered. Volume 1655, Page 767, General Minutes District Courts, in and for Harris County, Texas.

[Transcript, pp. 237-240]

NO. 1,052,262

In The
DISTRICT COURT OF HARRIS COUNTY, TEXAS
129th Judicial District

STEVEN GAEDECKE

v.

MOBIL OIL CORPORATION, ET AL

v.

GULF OFFSHORE CO.,
A DIVISION OF THE POOL COMPANY

JUDGMENT

BE IT REMEMBERED that on the 20th day of November, 1978, came on to be heard the above styled and numbered cause, wherein Steven Gaedecke is Plaintiff, Mobil Oil Corporation, Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. are Defendants, and Mobil Oil Corporation is Third-Party Plaintiff, and Gulf Offshore Co., A Division of the Pool Company is Third-Party Defendant, and Employers' National Insurance Company is Intervenor, and came the parties Plaintiff, Defendants, Third-Party Plaintiff, Third-Party Defendant and Intervenor, and announced ready for trial. Prior to the voir dire examination of the jury panel, Plaintiff, in open court, took a voluntary non-suit as to De-

fendants Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc., and the Court having noted said Non-Suit did by its Order dismiss the Defendants Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. only. And came the jury consisting of twelve good and lawful men and women consisting of Catherine Mary Byrnes and eleven others who being duly empaneled and sworn and having heard the pleadings, evidence, stipulations and arguments of counsel, did on the 22nd day of November, 1978, return in open court their verdict as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Mobil Oil Corporation, at the time in question and under the circumstances existing, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in one or both of the following:

1. In waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform in question?

   To which the jury answered "yes".

2. In the selecting of the method used to evacuate Steven Gaedecke's crew from the platform?

   To which the jury answered "yes'.

If you have answered "yes" to either parts of Special Issue No. 1, and only in that event, then answer

SPECIAL ISSUE NO. 2

Was such a proximate cause of the injuries suffered by Steven Gaedecke?

To which the jury answered "yes'.

SPECIAL ISSUE NO. 3

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Steven Gaedecke as a direct and natural result of the injuries he received in the incident in question.

You will consider the following elements of damage, if any, and none other:

(a) Loss of earnings which he has sustained in the past;

(b) Loss of earning capacity which in reasonable probability he will sustain in the future;

(c) Physical pain and mental anguish which he has suffered in the past;

(d) Physical pain and mental anguish which in reasonable probability he will suffer in the future;

(e) Physical impairment he has sustained in the past;

(f) Physical impairment which in reasonable probability he will sustain in the future.

Answer in dollars and cents, if any.

To which the jury answered "$900,000.00".

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Steven Gaedecke's injuries were incident to, or resulted directly or indirectly from the work to be performed by Gulf Offshore Company under its contract with Mobil?

To which the jury answered "yes".

Catherine Mary Byrnes

Verdict of the jury was received by the Court and filed and entered of record on the minutes of the Court, and the Court having considered the pleadings on file herein, the verdict of the jury, the stipulations of the parties and the proof adduced, and having considered Plaintiff's Motion for Judgment, the Court is of the opinion that Plaintiff is entitled to have and recover of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of entry of the Judgment until paid;

The Court is further of the opinion that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company should have and recover the sum of $32,712.09;

The Court is further of the opinion that Plaintiff should have and take nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

The Court is further of the opinion that Third-Party Plaintiff Mobil Oil Corporation is entitled to and is granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay to Plaintiff by the terms of this Judgment;

The Court having further heard arguments and having read the briefs is of the opinion that the Law of Louisiana does apply and hereby applies such law in this action;

It is therefore,

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Steven Gaedecke do have and recover of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of the entry of Judgment until paid;

ORDERED, ADJUDGED and DECREED by the Court that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company do have and recover the sum of $32,712.09;

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff has and takes nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

ORDERED, ADJUDGED and DECREED by the Court that Third-Party Plaintiff Mobil Oil Corporation is hereby granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay by the terms of this Judgment;

ORDERED, ADJUDGED and DECREED that all costs of court accrued herein be and are taxed against the Defendant Mobil Oil Corporation for which execution may issue with same if not timely paid.

All relief not granted herein is denied.

SIGNED, RENDERED and ENTERED this 18th day of December, 1978.

/s/ THOMAS J. STOVALL, JR.
Judge Presiding

APPROVED AS TO FORM ONLY:

JAMAIL AND KOLIUS

_____
Attorneys for Plaintiff

FULBRIGHT AND JAWORSKI

_____
Attorneys for Intervenor,
Employers' National Insurance Company

CRAIN, CATON, JAMES & OBERWETTER

_____
Attorneys for Defendant-Third-Party
Plaintiff, Mobil Oil Corporation

ROYSTON, RAYZOR, VICKERY & WILLIAMS

_____
Attorneys for Third-Party Defendant,
Gulf Offshore Company, a Division of
the Pool Company

BAKER AND BOTTS

_____
Attorneys for Defendants, Arthur
Levy Boat Company, Arthur Levy, Inc.
and Offshore Crews, Inc.

COURT OF CIVIL APPEALS OPINION

[Reported at 594 S.W.2d 496]

No. B2159

In The
COURT OF CIVIL APPEALS
For The
Fourteenth Supreme Judicial District of Texas

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Appellant

v.

MOBIL OIL CORPORATION, Appellee

Appeal from 129th District Court of Harris County

Affirmed, and Opinion filed December 12, 1979.

Appellant, Gulf Offshore Company, a Division of the Pool Company, appealed from a judgment for indemnity rendered in favor of appellee, Mobil Oil Corporation. Appellant Gulf Offshore was a third party defendant below and appellee Mobil was defendant and third party plaintiff. Steven Gaedecke was plaintiff in the trial court.

Steven Gaedecke, an employee of third party defendant-appellant Gulf Offshore, sued defendant-appellee Mobil, and L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc., for personal injuries sustained on a vessel owned by Levy and chartered by Mobil.

Mobil later filed a third party complaint against Gulf Offshore, alleging liability for indemnity pursuant to certain provisions in the contract for well completion operations which was executed by Gulf Offshore as the contractor-indemnitor and Mobil as platform owner-indemnitee.

Prior to trial, plaintiff Gaedecke settled with the Levy defendants for a guaranteed recovery of $100,000.00 and proceeded to take a non-suit against them. Plaintiff also reached agreement with defendant Mobil, that if Mobil did not obtain indemnity from Gulf, plaintiff's recovery against Mobil would be limited to $200,000.00 plus the compensation lien. Also present in the trial court was intervenor, Employers' National Insurance Company.

On September 22, 1975, plaintiff Gaedecke was safely aboard the vessel Salton-Seahorse, having been evacuated pursuant to the implementation of Mobil's hurricane evacuation plan. Defendant Mobil had arranged for the vessel, owned and operated by Levy, to stand by for the evacuation. Following preparation for evacuation, all machinery was shut down, and after evacuation from the platform of all but two platform workers employed by Gulf Offshore by use of the crane, even its generator was shut off. As the last two workers, the crane operator and his helper, attempted to evacuate from the platform using a rope to swing onto the deck of the Salton-Seahorse, plaintiff heard some party yell down to him to go aft and provide assistance. A large wave washed across the aft area of the vessel where he had positioned himself and plaintiff was swept along the deck of the vessel and ended up against a pallet loaded with sand. Plaintiff Gaedecke suffered injuries primarily to his back.

At trial in response to special issues, the jury returned a verdict which found that defendant, Mobil Oil Corporation, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform and in the selection of the method used to evacuate the crew from the platform; that such were a proximate cause of the plaintiff's injuries; that $900,000.00 would be a sum which would fairly and reasonably compensate plaintiff for injuries suffered; and that plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. The trial court entered judgment based on the jury's answers to the special issues and granted indemnity to Mobil from Gulf Offshore for $900,000.00 less the compensation lien of $32,712.09. Gulf Offshore appeals from the judgment of indemnity.

Defendant Mobil and third party defendant Gulf Offshore entered into contract number 1159, which concerned oil well completion operations to be performed by Gulf Offshore on defendant Mobil's platform wells situated in Grande Isle, Block 95, offshore of the State of Louisiana. Section 15 set out the provisions made concerning insurance and indemnity:

> 15. INSURANCE AND INDEMNITY:
>
> 15.1 At any and all times during the term of this agreement, Contractor agrees to maintain in force and submit evidence of insurance equal to or in excess of the requirements detailed in Exhibit B attached hereto and made a part hereof.

15.2 All insurance shall be carried in a company or companies acceptable to Mobil and shall be maintained in full force and effect during the term of this agreement, and shall not be canceled [sic], altered, or amended without ten (10) days prior written notice having first been furnished Mobil. Upon request Mobil shall be furnished certified copies of all such insurance policies.

15.3 In the event Contractor is a self-insurer and Mobil has consented to Contractor's being a self-insurer as to any one or more of the risks as to which coverage is required, evidence of such consent must be in writing and approved by a representative of Mobil authorized to enter into such consent agreement.

15.4 Contractor shall protect, indemnify and save Mobil Harmless against any and all claims, demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries or death, or damage to property occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees, and whether due to imperfection of any material furnished by Mobil, or the premises themselves or any equipment thereon, whether latent or patent, or for any other cause whatsoever; and for damages for infringement of any patent as more particularly set forth in Paragraph 23 hereof.

Appellant's first point of error addresses the threshold question of the jurisdiction of the courts of the State of Texas to entertain causes of action filed pursuant to the

Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979). There is no dispute as to the applicability of the Outer Continental Shelf Lands Act to this case. 43 U.S.C.A. § 1333(a)(1) (1975), in effect at the time of this accident, states that:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state.

The section of the Act in effect in this case, 43 U.S.C.A. § 1333(b) (1975), governing jurisdiction specifies that:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

We note that nowhere in this section does the word "exclusive" appear. Appellant argues that the Act vests exclusive jurisdiction of the subject matter of the plaintiff's main cause of action and the indemnity action in federal district court. We do not read 43 U.S.C.A. § 1333 (b) (1975) so as to oust our state courts of subject matter jurisdiction in this case.

No authoritative case law, either state or federal, has resolved the issue of the exclusivity of federal court jurisdiction over actions filed pursuant to the Outer Continental Shelf Lands Act. In *Fluor Ocean Services, Inc. v. Rucker Company,* 341 F.Supp. 757 (E.D. La. 1972), and *Borne v. Tenneco Oil Company, et al.,* 1973 A.M.C. 388 (E.D. La. 1972), Judge Rubin held that the Act conferred exclusive jurisdiction on the U.S. district courts for causes of action arising out of operations conducted on the outer Continental Shelf and further held in *Fluor* that the intent of Congress was to make such operations subject to the exclusive control and jurisdiction of the federal government. We disagree for the reasons stated in the foregoing paragraph. We also note that in the penultimate paragraph of the opinion in *Fluor,* Judge Rubin merely found that the federal district court had original jurisdiction.

Judge Rubin wrote that as a matter of policy, ". . . in an area where the federal government had exerted exclusive sovereignty, such as the outer Continental Shelf, a single federal forum would be more appropriate than multiple state forums to decide disputes that arise there." *Fluor Ocean Services, Inc. v. Rucker Company, supra* at 760. We do not believe this to be necessarily so. The Act provides that the Constitution and laws of the United

States govern the outer Continental Shelf, 43 U.S.C.A. § 1333(a)(1) (1975), and where applicable and not inconsistent with this Act or with federal laws, the laws of the adjacent state are declared to be the law of the United States regarding the outer Continental Shelf. 43 U.S.C.A. § 1333(a)(2) (1975). The end result would be an application of the same laws no matter where the forum was located, whether state or federal.

Following *Fluor* is the recent decision of *Friedrich v. Whittaker Corporation,* 467 F.Supp. 1012 (S.D. Tex. 1979). Here Judge Sterling recognized that the holding in *Fluor,* which acknowledged that such jurisdiction was original, did not necessarily include exclusive. Judge Sterling dismissed the case in *Friedrich* on other grounds, noting that a prompt authoritative resolution of the issue of original or exclusive jurisdiction by a federal appellate court would be welcomed. *Friedrich v. Whittaker Corporation, supra* at 1015. Nonetheless, *Friedrich* held that federal courts have exclusive jurisdiction over claims arising out of accidents on fixed oil rigs in areas covered by the Outer Continental Shelf Lands Act. *Id.* at 1014.

One Louisiana decision, *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. Ct. App.), *writ ref'd,* 247 La. 1016, 175 So.2d 301 (1965), has also faced the issue of the exclusivity of federal court jurisdiction under the Outer Continental Shelf Lands Act. The majority opinion, holding for exclusive federal court jurisdiction under the Act, drew a vigorous dissent. We follow the dissent in *Gravois* in two respects by holding that our state courts may take cognizance of an action asserted under this Act irrespective of the fact that the incident giving rise thereto occurred within the federally defined

limits of the outer Continental Shelf, and secondly, that our state courts have jurisdiction to adjudicate plaintiff's claims irrespective of which law must be applied in the determination thereof. *Gravois v. Travelers Indemnity Company,* 173 So.2d at 556, 559.

43 U.S.C.A. § 1333(b) (1975) of the Outer Continental Shelf Lands Act was amended and renumbered in 1978 to 43 U.S.C.A. § 1349(b)(1) (1978) and now reads in pertinent part as follows:

> . . . the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf or which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

The word "original" was omitted in the 1978 version. We find this omission significant in that it further supports our holding that the Act neither intended nor required sole original or exclusive jurisdiction in the federal courts. Point of error one is overruled.

In its second point on appeal, appellant Gulf Offshore contends that its Motion for Judgment Non Obstante Veredicto was improperly overruled because the jury verdict upon which the judgment of indemnity in favor

of defendant Mobil was predicated, was the product of fraud and collusion by attorneys for plaintiff and Mobil, and Mobil, therefore, is precluded from obtaining indemnity as a matter of law. A motion for judgment non obstante veredicto is proper ". . . if a directed verdict would have been proper . . ." TEX. R. CIV. P. 301.

In determining whether the trial court erred in refusing to grant a motion for judgment notwithstanding the verdict, the inquiry is whether there is any evidence of probative force to support the verdict of the jury. *City of San Augustine v. Roy W. Green Company,* 548 S.W. 2d 467, 472 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In determining whether there is any evidence of probative force to support the verdict, we are required to view the evidence in the light most favorable to the party against whom the motion is sought and every reasonable intendment deducible from the evidence is to be indulged in that party's favor. *Id.* at 472.

Based on the record, we fail to see how the jury's verdict in the instant case could be construed to be the product of fraud and collusion between counsel for plaintiff and counsel for Mobil. All parties were represented in trial by highly competent attorneys; all the agreements, the legality of which is uncontested, were disclosed prior to trial in the presence of the trial judge and duly recorded by the court reporter. Counsel for appellant Gulf Offshore was given ample opportunity to question the attorneys for the plaintiff and appellee Mobil at that time.

Attorneys engaged in the trial of cases have heavy responsibilities, and must have latitude in making tactical decisions as how to best represent their clients within the bounds of propriety. *General Motors Corporation v.*

Hebert, 501 S.W.2d 950, 957 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). Under these facts, where appellee Mobil was unable to reach agreement with appellant Gulf Offshore on the issue of indemnity, it is understandable that counsel for Mobil would cooperate with counsel for plaintiff to limit Mobil's potential liability in the event Mobil did not obtain indemnity from Gulf Offshore. Point of error two is overruled.

Points of error three, four, five and six complain of the lack of evidence to support the judgment for contractual indemnity given the language in Section 15.4 of the contract. Section 15.4 states in pertinent part:

> Contractor [Gulf Offshore] shall protect, indemnify and save Mobil Harmless against any and all claims, demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries . . . occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees . . .

Appellant Gulf Offshore contends that the plaintiff's injuries were not incident to or the result of Gulf Offshore's work to be performed under the contract with Mobil.

We find sufficient evidence in the record to support the jury's answer to special issue four which inquired whether or not plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. Plaintiff's own testimony that it was the normal thing to

do to assist the last two Gulf Offshore employees off the platform even though an evacuation was in progress and that it was customary to help other Gulf Offshore employees in the regular course of their work was uncontroverted. The evidence elicited regarding the work operations on the platform justifies the jury's answer that the injuries suffered by the plaintiff were incident to, or resulting directly or indirectly from the work required. These points of error are overruled.

In points of error seven, eight and nine, appellant Gulf Offshore contends that Louisiana law, applied as controlling federal law in this case, and Texas law prohibit contractual indemnity between an oil company and a contractor unless there is insurance coverage or alternatively, that any liability for indemnity should be limited to the amount of insurance required by the contract. Furthermore, appellant by relying on TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) urges that the public policy of the State of Texas prohibits contractual indemnity unless covered by insurance and then only to a maximum ceiling of $300,000.00.

43 U.S.C.A. § 1333(a)(2) (1975), in effect at the time of this accident, states that:

> To the extent that they are applicable and not inconsistent with the subchapter [Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979)] or with other federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that porition of the subsoil and seabed of the outer Continental Shelf, and

> artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States . . .

It is clear to this court that federal law, and decisions interpreting those laws, apply in this instance, and where there are no such laws or decisions, this court shall apply the laws and decisions of the State of Louisiana. The Outer Continental Shelf Lands Act makes it clear that federal law, supplemented by state law of the adjacent state, when not inconsistent with applicable federal law, is to be applied to the drilling rigs as artificial islands as though they were federal enclaves in an upland state. *Rodrique v. Aetna Casualty and Surety Company,* 395 U.S. 353, 355 (1969). It is evident that federal law is exclusive in its regulation of this area, and that state law is adopted only as surrogate federal law. *Id.* at 357.

In *Day v. Ocean Drilling and Exploration Company,* 353 F. Supp. 1350 (E.D. La. 1973), a motion for summary judgment was presented to the federal district court regarding interpretation of a contract containing an indemnity agreement similar to the one in our case. The contract before that court provided minimum limits of $300,000.00 for insurance coverage of contractual liabilities and indemnities assumed by the contractor covering all claims "incident to, arising out of, in conection with, or resulting from the activities of Subcontractor, its employees and agents . . . or in connection with the work

to be performed, services to be rendered, or materials to be furnished, under this contract . . ." *Id.* at 1351.

Plaintiff Day was working on a fixed platform located on the outer Continental Shelf. As he passed by a compressor, it suddenly exploded, injuring him.

Louisiana law was applied in *Day* as surrogate federal law to interpret the contract. The court held that while Louisiana courts have read such an indemnity agreement narrowly, the agreement must be given effect according to the intention of the parties. *Id.* at 1352. Judge Rubin did not limit his interpretation to any one of the phrases in the indemnity agreement, e.g. "arising out of" and "in connection with." Instead, taking the contract as a whole the court held that it was the intention of the parties to require indemnity against all risks of harm with insurance coverage and that such an indemnity agreement would be upheld.

We disagree with respect to the position taken by appellant Gulf Offshore that indemnity agreements are not enforceable under Louisiana law without insurance coverage. This issue was not reached in *Day* as insurance coverage was undisputably provided pursuant to the contract in that case. In the two cases cited by appellant, *Dickerson v. Continental Oil Company,* 449 F.2d 1209 (5th Cir. 1971), and *Hicks v. Ocean Drilling and Exploration Company,* 512 F.2d 817 (5th Cir. 1975), the limits of liability for the indemnitors in both cases were limited to the amounts of insurance coverage provided in the respective contracts. Unlike the facts before us, in neither case was there any dispute as to the limits of liability contracted for or that insurance coverage was in fact obtained.

The record in this case does not reflect any proof as to the existence of insurance obtained to protect against the risks assumed by appellant Gulf Offshore or any limits of liability agreed to by the parties in their contract. During the trial, appellee Mobil tendered into evidence certain documents identified as the contract executed by appellant Gulf Offshore and appellee Mobil, without any objections from appellant Gulf Offshore.

Later, appellant Gulf Offshore discovered an Exhibit B was unattached to the contract admitted into evidence. In a post-trial proceeding, appellant sought to have the exhibit made a part of the record. The unattached exhibit allegedly stated what the limits of liability were. Having made no objection to the offer of the contract at trial, appellant has waived any complaint concerning the exclusion of the exhibit. The trial court in the post-trial proceeding properly excluded the exhibit from the record since it was evidence on a controversial matter. *State v. Harrington*, 407 S.W.2d 467 (Tex. 1966), *cert. den.*, 386 U.S. 944 (1967); TEX. R. CIV. P. 270. For these reasons, we overrule as well appellant's alternative assertion that its liability for contractual indemnity should be limited to $100,000.00, that being the limit of liability allegedly required by the contract.

TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) declares indemnity provisions in agreements pertaining to wells for oil, gas, or water, or mines for other minerals, where there is negligence attributable to the indemnitee, void and unenforceable as against the public policy of the State of Texas, except if the parties agree in writing, that such indemnity obligation will be supported by liability insurance furnished by indemnitor,

and then only to the limits of insurance agreed to be furnished.

We hold that this provision has no application to the instant case. Applying federal law pursuant to the Outer Continental Shelf Lands Act and Louisiana law as surrogate federal law, where not inconsistent with federal law, the indemnity agreement in this case does not fail as against the public policy of the State of Louisiana irrespective of the existence or non-existence of insurance. *Hicks v. Ocean Drilling and Exploration Company,* 512 F.2d at 826; *Dickerson v. Continental Oil Company,* 449 F.2d at 1221. Following Justice Guittard in *Mamlin v. Susan Thomas, Incorporated,* 490 S.W.2d 634, 636-37 (Tex. Civ. App.—Dallas 1973, no writ), we hold that the Texas concept of public policy cannot prevail against the national policy enunciated in a federal act as declared by Congress in matters within its power. Points of error seven, eight and nine are overruled.

Appellant Gulf Offshore next urges error in the alignment of parties prior to the assignment of peremptory challenges and in the failure to equalize the challenges among the parties, thereby depriving appellant of a fair trial. Plaintiff Gaedecke was awarded twelve peremptory challenges and appellant Gulf Offshore and appellee Mobil were each awarded six peremptory challenges.

The granting of peremptory challenges depends on whether the interests of the parties within the meaning of TEX. R. CIV. P. 233 are, at least in part, antagonistic in a matter that the jury is to be concerned with. *Perkins v. Freeman,* 518 S.W.2d 532 (Tex. 1974). TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979)

requires the trial court, after alignment of the parties to equalize the number of peremptory challenges.

The record on appeal consists of a partial statement of facts, the jury voir dire having been omitted. Antagonism between plaintiff and appellee Mobil was shown by the pleadings and none of the pre-trial concessions changed that. The record does not reflect in any manner how appellant was injured by the jury selection process.

Appellant assigns as error the refusal of four requested special issues which inquire about appellee Mobil's negligence as vessel-charterer of the Salton-Seahorse. Appellant contends that favorable answers to these special issues could have established the negligence of Mobil as vessel-charterer being the sole cause of plaintiff's injuries, thereby precluding contractual indemnity against appellant Gulf Offshore. 33 U.S.C.A. § 905(b) (1978) precludes liability of an employer by agreement directly or indirectly for injuries to an employee caused by the negligence of a vessel.

We do not find any evidence in the record nor do the pleadings reveal that the issue of sole cause was raised. TEX. R. CIV. P. 279 requires that when a case is submitted upon special issues, only those controlling issues made by the written pleadings and the evidence shall be submitted. There was evidence from which the jury could have found appellee Mobil negligent as a fixed platform operator or as a vessel-charterer. Given the jury's answers to the special issue actually submitted, finding Mobil negligent in the capacity as fixed platform operator, the result would not have changed. We find no error in the refusal to submit the requested issues.

In its last three points of error, appellant attacks the refusal to submit tendered instructions prohibiting consideration by the jury of inflationary trends or increases in productivity as factors affecting awards for future wage loss, the inapplicability of federal income taxes and the reduction of any future damage award to present value by the use of an appropriate interest rate prevailing at time of trial.

The trial court properly refused to permit the jury from considering evidence as to inflationary trends as an element of damages for future wage loss. *Davis v. Hill Engineering Company,* 549 F.2d 314 (5th Cir. 1977); *Johnson v. Penrod Drilling Company,* 510 F.2d 234 (5th Cir.) (en banc), *cert. den.,* 423 U.S. 839 (1975). Increases in productivity were not proper for consideration by the jury. *Davis v. Hill Engineering Company,* 549 F.2d at 335. *Davis, Johnson,* and another case cited by appellant, *Blue v. Western Railway of Alabama,* 469 F.2d 487 (5th Cir. 1972), *cert. den.,* 410 U.S. 956 (1973), do not hold that appellant would be entitled to an affirmative instruction prohibiting the jury's consideration of these factors. Furthermore, the record before us gives no indication that the jury in fact considered inflationary trends or increases in productivity in calculating the damages award.

Johnson v. Penrod Drilling Company, 510 F.2d at 236-37, specifically prohibits consideration by the jury by evidence or instruction, of the impact of income taxes in the calculation of a proper award for loss of future wages.

Davis, Johnson and *Blue* permit a trial court to admit evidence pertaining to the reduction of the award for

future damages, to present value by the use of an appropriate interest rate prevailing at the time and place of trial. We hold that this was adequately provided for in the damage issue which was actually submitted and which inquired: "What sum of money, if any, if paid now cash . . ." would reasonably compensate plaintiff Gaedecke. *Davis, Johnson,* and *Blue* do not hold that appellant would be entitled to an instruction solely directing the jury to apply an appropriate interest rate to reduce to present value any sum awarded for future damages. Points of error twelve, thirteen and fourteen are overruled.

Having carefully reviewed all the points of error and the authorities cited in the briefs, we accordingly affirm the judgment of the trial court.

/s/ Felix Salazar, Jr.
Justice

Judgment rendered, and Opinion filed December 12, 1979.

Panel consists of Associate Justices Coulson, Salazar and Junell.

COURT OF CIVIL APPEALS JUDGMENT

NO. B-2159

In The
COURT OF CIVIL APPEALS
For The
Fourteenth Supreme Judicial District of Texas

GULF OFFSHORE COMPANY
A DIVISION OF THE POOL COMPANY

v.

MOBIL OIL CORPORATION, ET AL

"This cause, being an appeal from the judgment rendered by the court below and entered on December 28, 1978, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellant, Gulf Offshore Company, a division of the Pool Company, and its surety, Western Surety Company, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

COURT OF CIVIL APPEALS
NOTICE OF OVERRULING OF MOTION FOR REHEARING

COURT OF CIVIL APPEALS
Civil Courts Building
14th Supreme Judicial District
Houston, Texas 77002

January 9, 1980

Hon. Charles D. Kennedy
Hon. Bradley A. Jackson
Royston, Rayzor, Vickery & Williams
Suite 3710
One Shell Plaza
Houston, Texas 77002

Hon. Frank Caton
Hon. Gary L. Marks
Crain, Caton, James & Oberwetter
3300 Two Houston Center
Houston, Texas 77002

Hon. Joseph D. Jamail
Hon. Gus Kolius
Hon. John B. Neibel
Hon. Nat B. King
Jamail & Kolius
3300 One Allen Center
Smith at Dallas Streets
Houston, Texas 77002

Re: B2159—Gulf Offshore Company, a division of the Pool Company v. Mobil Corporation, et al, from Harris

Gentlemen:

Please be advised that on this date in the above cause the Court OVERRULED appellant's motion for rehearing.

Also, please be advised that application for writ of error, if any, must be submitted on or before Friday, February 8, 1980.

Respectfully,

/s/ THELMA MUELLER
Thelma Mueller, Clerk

SUPREME COURT OF TEXAS
NOTICE OF REFUSAL OF APPLICATION
FOR WRIT OF ERROR

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

June 18, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9169, GULF OFFSHORE CO., A DIVISION OF THE POOL COMPANY v. MOBIL OIL CORPORATION ET AL was this day refused. No reversible error.

Very truly your,

GARSON R. JACKSON, Clerk

SUPREME COURT OF TEXAS
NOTICE OF OVERRULING OF MOTION
FOR REHEARING

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

July 16, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of B-9169, Gulf Offshore Company

v.

Mobile Oil Corp et al.

was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON, Clerk

Supreme Court, U. S.
FILED
NOV 4 1980
MICHAEL RODAK, JR., CLERK

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of record for Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED FOR REVIEW[1]

Gaedecke, being dissatisfied with the presentation of petitioner, submits the following:

1. Does the original 1953 Outer Continental Shelf Lands Act ("Lands Act"), 43 U.S.C. § 1333(b), granting United States district courts *"original jurisdiction"* of controversies arising under the Act, or the "Amendments of 1978" thereto (43 U.S.C. § 1349(b)(1))[2] granting United States district courts *"jurisdiction"* of controversies arising under the Act, give federal courts EXCLUSIVE jurisdiction?

2. Does this court have *jurisdiction* to consider the exclusion of federal income taxes in computing damages when petitioner *failed to comply with Texas procedure* in requesting the Texas district court, where the case was tried, to instruct the jury that any damage award to plaintiff Gaedecke is not income to him within the meaning of the federal income tax law?

3. Should the holding of this court in *Norfolk and Western Railway Company v. Liepelt,* 100 S.Ct. 755 (February 19, 1980), *a Federal Employer's Liability Act ("FELA") wrongful death case* approving a jury instruction not to consider federal income taxes in fixing its award, be applied to this *common law* personal injury case?

---

1. Parties in the court whose judgment is sought to be reviewed are: Gulf Offshore Company, a Division of the Pool Company, Mobil Oil Corporation and Steven Gaedecke. They are referred to by abbreviated name—"Gulf," "Mobil," "Gaedecke."

2. To be cited as the "Outer Continental Shelf Lands Act Amendments of 1978." Sec. 1, Pub. L. 95-372, 92 Stat. 629.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW AND LIST OF PARTIES	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	II
INTRODUCTION	1
JURISDICTION AND A PARTIAL OBJECTION THERETO	2
STATUTES WHICH THE CASE INVOLVES	4
STATEMENT OF THE CASE	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT—WHY THE WRIT SHOULD BE DENIED	9
I. The United States District Courts Do Not Have *Exclusive* Jurisdiction Of This Case	9
II. This Court's Decision In *Norfolk and Western Railway Company v. Liepelt* As To Jury Instructions Concerning Federal Income Tax Is Not Applicable To This Case	17
CONCLUSION	21
CERTIFICATE OF SERVICE	22
APPENDIX	23

TABLE OF AUTHORITIES

CASES

	Page
Bruner v. United States, 343 U.S. 112, 72 S.Ct. 581, 584, 96 L.Ed. 786 (1952)	11
Cazad v. Chesapeake & Ohio Railway, 622 F.2d 72 (4th Cir. 1980)	21
Chaflin v. Houseman, 93 U.S. 130, 23 L.Ed. 833 (1876)	13
Charles Dowd Box Co. v. Courtney, 82 S.Ct. 519, 368 U.S. 502, 7 L.Ed.2d 483 (1962)	13, 14
Chesapeake and Ohio Railway Company v. De Atley, 241 U.S. 310, 317, 36 S.Ct. 564, 60 L.Ed. 1016 (1916)	4
Chevron Oil Company v. Huson, 404 U.S. 97, 104, 92 S.Ct. 349, 30 L.Ed. 296	18
Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837, 839 (5th Cir. 1976)	18

CASES

	Page
Deep Seabed Hard Mineral Resources Act of June 28, 1980, (94 Stat. 553)	11
Edelman v. People of State of California, 344 U.S. 357, 359, 73 S.Ct. 293, 295 (1953)	2
Farmers' and Mechanics' Nat. Bank v. Hanks, 137 S.W. 1120, 1122 (Tex. 1911)	18
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 1210 (1963)	15
Gevinson v. Manhattan Const. Co. of Oklahoma, 449 S.W. 2d 458, 465, n.2 (Tex. 1969)	19
Gonzales v. Succession of Medica, 141 So.2d 887, (La. App. 1962)	18
Gonzales v. Texas Department of Human Resources, 581 S.W.2d 522, 526 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e., cert. den. 100 S.Ct. 1079)	4
Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La. Ct. App.) writ ref'd, 175 So.2d 301 (1965)	10
Guess v. Read, 290 F.2d 622 (5th Cir. 1961, cert. den. 368 U.S. 957)	16
Houston East & West Texas Ry. Co. v. Matthews, 12 S.W. 2d 163, 164 (Tex. Comm. App., 1929, holding approved)	3, 4
Kansas v. Oklahoma, 306 U.S. 655, 696, 27 S.Ct. 655, 667 (1906)	18
Lang v. Texas Pacific Railway Co., 624 F.2d 1275 (5th Cir. 1980)	21
Merchants Insurance Co. v. Ritchie, 5 Wall. 541, 18 L.Ed. 540, 541 (1866)	12
Missouri K. & T. Ry. Co. v. Strafford, 31 S.W. 319 (Tex. 1895)	3
Moczygemba v. Danos & Curiole Marine Contractors, 561 F.2d 1149, 1151 (5th Cir. 1977)	17
Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 308, 23 S.Ct. 375, 378, 47 L.Ed. 480 (1903)	2
Newman v. Dehli Gas Pipeline Co., 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ)	3
Norfolk and Western Railway Company v. Liepelt, 100 S.Ct. 755 (1980)	17, 19, 20, 21
Pirie v. Chicago Title and Trust Co., 182 U.S. 438, 21 S.Ct. 906, 45 L.Ed. 1171 (1900)	13
Rodrique v. Aetna Casualty Company, 395 U.S. 352, 365, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969)	17
62 Cases, Etc. v. United States, 71 S.Ct. 515, 340 U.S. 593, 596, 95 L.Ed. 566 (1951)	10
Sun Ship, Inc. v. Pennsylvania, 100 S.Ct. 2432, 2437 (1980)	13
Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947)	13

CASES

Page

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281, 89 S.Ct. 518, 526 (1969) 12
Treasure Salvors v. Unidentified Wrecked Etc., 569 F.2d 330 (5th Cir. 1978) 16
Turner v. Bank of North America, 4 Wall. 8, 1 L.Ed. 715, 719 (1799) 10
Turner v. General Motors, 584 S.W.2d 844, 853 (Tex. 1979) 19
United States v. Alexander, 602 F.2d 1228 (5th Cir. 1979) 16
United States v. Florida, 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976) 16
Western Union Teleg. Co. v. Case Publishing Co., 181 U.S. 92, 101, 102, 21 S.Ct. 561 (1901) 18
Wolfe v. State of North Carolina, 364 U.S. 177, 195, 80 S.Ct. 1482, 1492, 4 L.Ed.2d 1650 (1960) 2

UNITED STATES STATUTES

28 U.S.C. § 1257(3) 2
43 U.S.C. § 1333(a) 4
43 U.S.C. § 1333(a)(2) 17
43 U.S.C. § 1333(a)(2)(A) 17
43 U.S.C. § 1333(b) 2, 4, 9, 10, 11, 12, 13
43 U.S.C. § 1349(b)(1) 2, 4, 11, 12, 13

TEXAS RULES OF CIVIL PROCEDURE

Rule 184(a) 19
Rule 276 3

TEXTS

15 Am. Jur. 2d *Commerce* § 34, n.62, p. 363 15
HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 34 (1959) 4
3 MCDONALD, TEXAS CIVIL PRACTICE § 12.36.1, n.5º p. 431 (1970 Rev. Ed.) 3

MISCELLANEOUS

ANNOT., 30 A.L.R. Fed. 535 (1976) 9
HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, pp. 470-471 (2d ed. 1973) 15
H. R. Rep. No. 215, to accompany H. R. 4198, 83rd Cong., 1st Sess. (1953) 15
H. R. Rep. No. 413, to accompany H. R. 5134 (1953) ... 15
TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 384 ... 15
1952 U.S. CODE CONG. & AD. NEWS 908-913 15
1953 U.S. CODE CONG. & AD. NEWS 2177 ..... 15, 16
U.S. CODE CONG. & AD. NEWS 1385 15

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Respondent Steven Gaedecke ("Gaedecke"), plaintiff in the trial court and a party to the proceeding in the

court whose judgment is sought to be reviewed (S.Ct. R. 19.6 (1980)) requests this Court to deny the petition for certiorari filed herein by petitioner Gulf Offshore Company, a Division of the Pool Company ("Gulf").

JURISDICTION AND A PARTIAL OBJECTION THERETO

1. Gaedecke concedes that this court has jurisdiction under 28 U.S.C. § 1257(3) to consider the question of exclusive jurisdiction, *vel non*, of the United States district courts under the original 1953 Lands Act (43 U.S.C. § 1333(b)) and the "Amendments of 1978" thereto (43 U.S.C. § 1349(b)(1)).

2. He denies that this court has jurisdiction to consider the state trial court's failure to instruct the jury to exclude federal income taxes in computing damages (Petitioner's point II, Pet. for Cert., p. 1[illegible] et seq.) because, even if this is a federal question, petitioner did not present the matter in the state trial court in accordance with the Texas Rules of Civil Procedure. To maintain jurisdiction on the ground that a state court has denied a federal right that right must be asserted according to state practice and procedure. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 378, 47 L.Ed. 480 (1903), *Wolfe v. State of North Carolina*, 364 U.S. 177, 195, 80 S.Ct. 1482, 1492, 4 L.Ed.2d 1650 (1960). Failure to do so "is an adequate state ground for a decision below." *Edelman v. People of State of California*, 344 U.S. 357, 359, 73 S.Ct. 293, 295 (1953). The following Points A and B were raised by the Texas Supreme Court by Gaedecke in opposing Gulf's application for writ of error.

A. As the record fails to show that the state trial judge acted on petitioner's requested instruction "C", directing the jury not to consider federal income taxes in awarding damages, any error was waived and presents nothing for review.

Tex. R. Civ. P. 276 (Appendix A) provides that when a requested instruction is refused by the trial judge, "he shall endorse thereon 'refused' and sign the same officially." Gulf's requested Instruction No. C *does not show it was ever presented to or acted on by the trial judge.* It was therefore waived and presents nothing for review. *Newman v. Dehli Gas Pipeline Co.*, 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ); 3 McDONALD, TEXAS CIVIL PRACTICE § 12.36.1, n.59, p. 431 (rev. ed. 1970).

It is true that the trial judge *signed* Gulf's requested Instruction A, but did not endorse requested Instruction C as to federal income taxes *"Refused"* (Appendix B). His naked signature on A is meaningless as to C, even assuming requested Instructions A, B and C were filed together.

B. As petitioner presented no evidence whatsoever as to federal income taxes it was not entitled to a jury instruction on the subject.

It is uniformly held by the Texas courts that jury instructions should not be given as to any matter not raised by the evidence. *Missouri K. & T. Ry. Co. v. Strafford,* 31 S.W. 319 (Tex. 1895); *Houston East & West Texas Ry. Co. v. Matthews,* 12 S.W.2d 163, 164 (Tex. Comm.

App., 1929, holding approved); *Gonzales v. Texas Department of Human Resources,* 581 S.W.2d 522, 526 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e., cert. den. 100 S.Ct. 1079); HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 34 (1959).

Petitioner does not assert that any evidence was introduced regarding federal income taxes, and none was in fact introduced.

With no evidence there was simply no legal basis to submit requested Instruction No. C under Texas procedure. Jury issues, even in a case based on a Federal statute tried in a state court, must be given in accordance "with local rules of practice and procedure." *Chesapeake and Ohio Railway Company v. De Atley,* 241 U.S. 310, 317, 36 S.Ct. 564, 60 L.Ed. 1016 (1916).

STATUTES WHICH THE CASE INVOLVES

Petitioner quotes *only* § 1333(a) and (b) of Title 43 of the United States Code, a part of the original 1953 Lands Act (67 Stat. 462, c345, § 4) as being involved in this case. (Pet. for Cert., p. 2-4).

This case also involves part of the "Outer Continental Shelf Lands Act Amendments of 1978" (§ 1, Pub. L. 95-372, 92 Stat. 629), viz.

43 U.S.C. § 1349(b)(1) specifically pertaining to jurisdiction of the United States District Courts which provides as follows:

> (b)(1) Except as provided in subsection (c) of this section,[2a] the district courts of the United States

2a. Review of actions of the Secretary of the Interior.

shall have *jurisdiction* of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose (Emphasis ours).

Section 1333 provides that:

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

STATEMENT OF THE CASE

Gaedecke, being dissatisfied with the presentation of petitioner, submits the following succinct statement of the case:

This common law negligence action for personal injury was filed on November 20, 1975 by Gaedecke as plaintiff in the 129th District Court of Harris County, Texas against Mobil for personal injuries he sustained on September 22, 1975 aboard a boat provided by Mobil following his negligent emergency evacuation from a fixed drilling platform owned by Mobil. The platform was located in the Gulf of Mexico off the Louisiana coast.

Gaedecke was an employee of Gulf. Mobil, in turn, sued Gulf as a third party defendant for contractural indemnity.

Trial, which began on November 29, 1978, was to a jury and based on answers to special issues finding Mobil guilty of negligence, causation and damages, the district court on December 18, 1978, rendered judgment for Gaedecke against Mobil and granted Mobil indemnity from Gulf for all sums it was required to pay under the judgment (Pet. for Cert., Appendix A-22).

Gulf appealed to the Texas Court of Civil Appeals, which, on December 12, 1979 affirmed the judgment of the District Court (Pet. for Cert., Appendix A-1). Gulf filed an application for a writ of error in the Texas Supreme Court, which was refused "no reversible error" on June 18, 1980 (*Id.*, Appendix A-20). Gulf's motion for rehearing in that court was overruled on July 16, 1980 (*Id.*, Appendix A-21).

SUMMARY OF THE ARGUMENT

I.

State and Federal Courts Have Concurrent Jurisdiction Under the Lands Act

1. In federal courts, in contrast to state courts of general jurisdiction, a cause is without jurisdiction until the contrary appears. The original 1953 Lands Act gives federal courts *"original jurisdiction"* and the 1978 Amendments thereto gives them *"jurisdiction"* of controversies under the Act. Neither statute even suggests *"exclusive jurisdiction"* in the federal courts.

2. As this Court cannot supply what Congress omits, the word "exclusive," it follows that under the original 1953 Act and the 1978 Amendments, state and federal courts have concurrent jurisdiction of controversies under the Lands Act. Further, assuming arguendo that the original 1953 Act granted "exclusive" jurisdiction, this was changed by the 1978 Amendments which were in force when this case was tried in the district court, and decided by the Texas appellate courts. Statutory changes pendente lite are honored by this court.

3. The Act as a whole does not give federal courts jurisdiction "by fair implication [sic]."

II.

Norfolk & Western Ry. Co. v. Liepelt Is Not Applicable To The Case At Bar

1. This case is a common law negligence action for personal injuries brought by Gaedecke in a *Texas* District Court for injuries sustained while being evacuated from a drilling platform ("fixed structure") off the coast of *Louisiana*. Under both the original 1953 Lands Act and the 1978 Amendments thereto Louisiana law was applicable as "surrogate federal law," yet there was no proof of Louisiana law as to either negligence or damages.

2. *Liepelt*, which approved a jury instruction not to consider federal income taxes in its award, was a *statutory* FELA wrongful death case in which damages are completely different from those awarded in a *common law personal injury case*. Further, *Liepelt*, as well as Texas procedure, requires the introduction of *evidence* regarding federal income taxes as a prerequisite to such an instruction. Petitioner provided no evidence whatsoever as to federal income taxes.

3. *Liepelt*, being a federal statutory case, can be retroactively applied in FELA cases only.

ARGUMENT

WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I.

THE STATE COURTS HAD SUBJECT MATTER JURISDICTION OF THIS CASE, AND EXCLUSIVE JURISDICTION IS NOT IN THE FEDERAL COURTS

1. The 1953 Outer Continental Shelf Lands Act.

The original 1953 Outer Continental Shelf Lands Act (43 U.S.C. § 1333(b)), says "The United States district courts shall have *original jurisdiction* of controversies arising under this Act" (emphasis ours). Nowhere does the word *exclusive* appear.[3]

Neither this Court or any Federal circuit court of appeals have passed on the "exclusive" jurisdiction question raised by petitioner. Gulf supports its position with an annotation in 30 A.L.R. Fed. 535 (1976), three federal district court cases (two by Judge Alvin B. Rubin in Louisiana and one by Judge Ross N. Sterling in Texas) and the divided opinion of a Louisiana *intermediate* appellate court[3a] (Pet. for Cert., p. 8-9, 13-14).

The decisions of Judge Rubin and Judge Sterling are hardly persuasive as the Texas Court of Civil Appeals in

---

3. This is the way the Act read on the date Gaedecke's accident occurred, the date suit was filed and the date Mobil sued Gulf (Pet. for Cert., p. 10). As we shall see the Act was amended on September 18, 1978, omitting the word "original," thus further excluding any idea of *exclusive* jurisdiction.

3a. Not "The decision of the court of last resort in Louisiana." as counsel says in his Petition (Pet. for Cert., p. 8).

this case aptly points out (594 S.W.2d at 501, 502; Pet. for Cert., Appendix A-5-7). It preferred to follow the dissent of Judge Landry in *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. Ct. App., writ ref'd, 175 So. 2d 301 (1965) that appears at 173 So.2d 556-563 (594 S.W.2d at 502; Pet. for Cert., Appendix A-7).

In *Gravois* the question of jurisdiction was treated in "an offhanded manner" (173 So.2d 553) with the result that the majority fell into constitutional error and held (173 So.2d 556):

> Had Congress intended to grant concurrent jurisdiction to the State Courts it would have so specified in this Act as they did in the Jones Act. The failure to do so shows their intention to *retain* [sic] jurisdiction in the United States Courts (emphasis ours).

On the contrary, this Court held long ago that in federal courts, in contrast to state courts of general jurisdiction, "A cause is without its jurisdiction, until the contrary appears." *Turner v. Bank of North America,* 4 Dall. 8, 1 L.Ed. 715, 719 (1799).

What Gulf would have this court do is to add the word "exclusive" to 43 U.S.C. § 1333(b) and make it read "*exclusive* original jurisdiction." But this Court holds that it may not by construction insert words in a statute: what Congress omits, it cannot supply. *62 Cases, Etc. v. United States,* 71 S.Ct. 515, 340 U.S. 593, 596, 95 L.Ed. 566 (1951).

Congress expresses its purpose by words. Thus, if it had intended for the federal district courts to have exclusive jurisdiction under the Lands Act, it would have said so,

just as it did in the *Deep Seabed Hard Mineral Resources Act* of June 28, 1980, (94 Stat. 553)—"The district courts of the United States shall have *exclusive* jurisdiction over any case or controversy arising under the provisions of this Act." (94 Stat. at 580). (Emphasis ours).

2. The Outer Continental Shelf Lands Act Amendments of 1978

On September 18, 1978, Congress passed the Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372, 92 Stat. 629).

Former subsection (b) of 43 U.S.C. § 1333(b), giving United States district courts "original jurisdiction" of controversies arising under the Act was stricken. A *new* provision for jurisdiction of United States district courts was added in a *new* section, (92 Stat. 657, 658, § 23(b)(1)), and codified as 43 U.S.C. § 1349(b)(1). See 43 U.S.C.A. § 1333, 1980 Supp. "1978 Amendment," p. 81. The new law provides for *"jurisdiction,"* not *"original* jurisdiction," of United States district courts. Again, there is no mention of "exclusive jurisdiction."

In *Bruner v. United States,* 343 U.S. 112, 72 S.Ct. 581, 584, 96 L.Ed. 786 (1952), this court said (343 U.S. at 116-117):

> It is clear, that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction.
>
> * * * *
>
> This rule—that when a law conferring jurisdiction is repealed without any reservation as to pending

cases, all cases fall with the law—has been adhered to consistently by this Court.

The result is that 43 U.S.C. § 1333(b), the former 1953 Lands Act jurisdiction section, was replaced by the enactment of an entirely *new* jurisdiction section, 43 U.S.C. § 1349(b)(1), on *September 18, 1978* during the pendency of this suit. The jurisdiction of the trial court is therefore properly determined as of the date its judgment in this case on December 18, 1978, (Pet. for Cert., Appendix A-22), *Merchants Insurance Co. v. Ritchie,* 5 Wall. 541, 18 L.Ed. 540, 541 (1866). Also the Court of Civil Appeals and the Texas Supreme Court were obliged to apply the law in effect at the time they subsequently rendered their respective decisions. *Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 281, 89 S.Ct. 518, 526 (1969).

If there was any exclusive federal district court jurisdiction under the original 1953 Lands Act, when Congress changed its grant of "original jurisdiction" to "jurisdiction" pendente lite any implied "exclusive" jurisdiction ended.

Congress must have intended changes by the new and limited grant of "jurisdiction" to the federal district courts by its 1978 Amendments. The jurisdictional section in the former law, 43 U.S.C. § 1333(b), had become controversial, i.e. did the language giving the U.S. district courts "original jurisdiction" mean to confer upon them "*exclusive*" original jurisdiction"? (See discussion under subhead 1, supra). It thus becomes significant that Congress in the 1978 Amendments rewrote the jurisdictional section of the 1953 Act, moved that entire section from 43

U.S.C. 1333(b) to a completely new section, 43 U.S.C. § 1349(b)(1), and in the process dropped from the grant of jurisdiction the word "original." This action by Congress signals a clear change in the law.

This Court has held that an omission from an amendatory act of words contained in an original act raises a presumption that a change in meaning or purpose was intended. *Pirie v. Chicago Title and Trust Co.*, 182 U.S. 438, 21 S.Ct. 906, 45 L.Ed. 1171 (1900). In *Sun Ship, Inc. v. Pennsylvania*, 100 S.Ct. 2432, 2437 (1980), this Court said:

> It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting the intent to command such exclusivity.

3. Concurrent Jurisdiction

The mere grant of jurisdiction to a lower federal court does not imply a denial of historic state court jurisdiction, or give the federal court *exclusive* jurisdiction. *Chaflin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833 (1876). Even when state court litigation is based upon a federal statute, this Court has held—under the principle of strictly construing congressional grants of jurisdiction to the lower federal courts—that state courts have concurrent jurisdiction with the lower federal courts. *Chaflin v. Houseman, supra; Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947).

The rule in *Chaflin* was followed in *Charles Dowd Box Co. v. Courtney*, 82 S.Ct. 519, 368 U.S. 502, 7 L.Ed.2d 483 (1962) where the court considered a federal statute that did "not state or even suggest that such [federal]

jurisdiction be exclusive" (368 U.S. at 506). The Supreme Judicial Court of Massachusetts had held it had concurrent jurisdiction:

> We do not accept the contention that State courts are without jurisdiction. The statute does not so declare. The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State Courts.
>
> * * * *
>
> In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts. (Quoted at 368 U.S. 505).

This Court agreed and affirmed the Massachusetts court holding that it had jurisdiction (368 U.S. at 506).

4. No Exclusivity From "Fair Implication" From The Act As A Whole

Petitioner argues that *"by fair implication"* [sic] the Lands Act pre-empts state court jurisdiction in "the Lands Area," (Pet. for Cert., p. 10); or more broadly "cases and controversies arising out of or in connection with operations conducted on the Outer Continental Shelf" (*Id.*, p. 12); then more narrowly, "to cases such as the one at bar" (*Id.*, p. 13); and finally, most narrowly, only "artificial islands" (*Id.*, p. 15).

"But federal occupation of a field will not be lightly inferred." TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 384; 15 Am. Jur. 2d *Commerce* § 34, n.62, p. 363.

> Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation. HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, pp. 470-471 (2d ed., 1973).

There is no preemption unless Congress has (1) clearly expressed it, or (2) unless the "nature of the regulated subject matter permits *no other conclusion but preemption of state power.*" Emphasis ours. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 1210 (1963).

Reference to the general history, the legislative history, the relevant legislation and case gloss all clearly show that the subject matter regulated by the original Lands Act, and as amended, is the oil and gas and other mineral resources lying in the soil and seabed of the offshore waters. See President Truman's Veto Message, 1952 U.S. CODE CONG. & AD. NEWS 908-913; H. R. Rep. No. 215 to accompany H. R. 4198, 83rd Cong., 1st Sess. (1953); U.S. CODE CONG. & AD. NEWS 1385; H. R. Rep. No. 413 to accompany H. R. 5134 which became the Outer Continental Shelf Lands Act, 1953 U.S. CODE CONG. & AD.

NEWS 2177; *Guess v. Read,* 290 F.2d 622 (5th Cir. 1961, cert. den. 368 U.S. 957); *Treasure Salvors v. Unidentified Wrecked Etc.,* 569 F.2d 330 (5th Cir. 1978); *United States v. Alexander,* 602 F.2d 1228 (5th Cir. 1979).

The intent of the Lands Act is to cut off state interests in "the lands, minerals and other natural resources more than three geographic miles from the coastline of that state," and to entitle the United States to those lands, minerals and resources. *United States v. Florida,* 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976).

A limited construction of the Lands Act comports with its "primary purpose of resolving competing claims to the ownership of the natural resources of the offshore seabed and subsoil." *Treasure Salvors v. Unidentified Wrecked Etc., supra,* at p. 339.

> [A]n extension of jurisdiction for purposes of controlling exploitation of the natural resources of the continental shelf is not necessarily an extension of sovereignty. *Id.*

The Lands Act grant of jurisdiction to the United States district courts must be construed narrowly in light of the overall purpose of the Act, which is to lease for mineral development. *United States v. Alexander, supra,* at p. 1231.

The Lands Act as a whole does not expressly preempt state court jurisdiction over this tort case, nor does it imply preemption under the *Paul* test, *supra,* since such jurisdiction in no way affects U.S. ownership and control of the lands, seabed, and subsoil of the Outer Continental Shelf.

II.

NORFOLK AND WESTERN RAILWAY COMPANY V. LIEPELT, 100 S.CT. 755 (1980) IS NOT APPLICABLE TO THIS CASE

1. Liepelt Is a FELA Wrongful Death Case and Does Not Apply to the Case at Bar, a Common Law Negligence Case For Personal Injury

The case at bar is a common law negligence case for personal injury; *Liepelt* was a statutory FELA wrongful death case, and compensable damages differ in each. Under the Lands Act, Gaedecke's common law cause of action for personal injuries against a nonemployer negligent tortfeasor is governed by the law of the state adjacent to the fixed drilling platform ("fixed structure") on which Gaedecke worked for Gulf. This is Louisana. Original 1953 Lands Act, 43 U.S.C. § 1333(a)(2), and as amended in 1978, 43 U.S.C. § 1333(a)(2)(A). Such state law is "surrogate federal law." *Rodrique v. Aetna Casualty Company,* 395 U.S. 352, 365, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The case at bar is the equivalent of a Louisiana tort case governed by Louisiana law. See *Moczygemba v. Danos & Curiole Marine Contractors,* 561 F.2d 1149, 1151 (5th Cir. 1977). Thus it does not follow that a court applying Louisiana law in a case for damages for common law negligence resulting in personal injuries must adopt statutory federal law as the measure of damages. To apply FELA jury instructions as to federal income tax in a case governed by Louisiana law, particularly without even knowing what Louisiana law is, would violate this Court's admonition "That federal courts should not create interstitial federal common law

when the Congress has directed that a *whole body* of state law shall apply." *Chevron Oil Company v. Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 30 L.Ed. 296.

Liepelt stands only for the limited proposition that the measure of damages under a congressionally created cause of action for wrongful death, an action not known at common law,[4] is governed by the terms of the statute creating the cause of action and which defines specifically the measure of damages.

There is no congressional statute in this lawsuit which purports to create the cause of action for personal injuries instituted by Gaedecke, much less prescribe his measure of damages. Certainly, there is not one word in the Lands Act, and petitioner cites none, that gives Gaedecke his cause of action for personal injuries in this case. And that is where petitioner stumbles—by believing that the Lands Act created Gaedecke's cause of action (Pet. for Cert., p. 18). Instead we have a clear case of *casus omissus.*

A common law cause of action is one that does not rest for its authority upon any express statute, but upon the decisions of the courts. *Kansas v. Oklahoma,* 306 U.S. 655, 696, 27 S.Ct. 655, 667 (1906); *Western Union Teleg. Co. v. Case Publishing Co.,* 181 U.S. 92, 101, 102, 21 S.Ct. 561 (1901).

The Texas district court, following Texas procedural rules,[5] correctly presumed, in the absence of any tender

---

4. Gonzales v. Succession of Medica, 141 So.2d 887, (La. App. 1962); Farmers' and Mechanics' Nat. Bank v. Hanks, 137 S.W. 1120, 1122 (Tex. 1911); Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837, 839 (5th Cir. 1976).

5. As to the need to follow Texas procedural rules in this case, see pp. 2-4, supra.

of any proof of Louisiana law on either negligence or measure of damages for personal injuries, that Louisiana law was the same as Texas law. Tex. R. Civ. P. 184(a), (Appendix C); *Gevinson v. Manhattan Const. Co. of Oklahoma,* 449 S.W.2d 458, 465, n.2 (Tex. 1969). Thus, following *Turner v. General Motors,* 584 S.W.2d 844, 853 (Tex. 1979) it refused to instruct the jury that income tax consequences of its award of damages should not be considered.

2. As No Evidence Regarding Federal Income Tax was Introduced By Gulf, Liepelt Is Inapplicable to the Case at Bar.

In *Liepelt,* this Court of necessity restricted itself to the facts before it and decided that the jury's verdict was, *under the evidence,* excessive. Liepelt's expert (an economist), using gross earnings without any deduction for income taxes, produced a damage total reduced to present value of $302,000 (100 S.Ct. at 756). The railroad objected to this evidence and offered to prove by its own expert (an actuary) that taking into account decedent's federal income taxes, and making different assumptions, that the net pecuniary loss was $138,327. The jury returned a verdict of $755,000! (100 S.Ct. at 756, 757).

The railroad argued that the jury must have assumed that the award was subject to federal income taxation; otherwise, the verdict would not have exceeded even plaintiff's own expert's opinion by such a large margin—almost a half million dollars (100 S.Ct. at 757). This Court held that the evidence of "estimated after-tax earnings" should have been admitted (100 S.Ct. at 758). It *then* held that the jury should have been instructed not to

consider income taxes in fixing the amount of its verdict "in this case" (100 S.Ct. at 759).

This decision, based on an assumption as to why the jury overran plaintiff's damage evidence by almost a half million dollars, does *not* apply to the present common law personal injury case where Gulf made no effort to introduce any evidence whatsoever of Gaedecke's estimated after-tax earnings.

Liepelt clearly holds that, except in cases of *de minimus,* evidence of the impact of future income tax in calculating an award is required if the jury is to be instructed that federal income tax should not be considered in fixing the amount of the award (100 S.Ct. at 758 and n.7). The Court gives these assuring words to trial judges and counsel:

> * * * But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an *expert calculation* in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. * * * (100 S.Ct. at 758). (Emphasis ours).

However, Gulf presented nothing to the jury in the nature of "an expert calculation," and submitted its Requested Jury Instruction C *without any evidence whatsoever* on which to base it.[6]

The admonitory instruction not to consider income taxes in making a damage award was given in *Liepelt* only after it was raised by evidence.

---

6. As we have demonstrated above (pp. 3, 4) Texas practice did not permit Gulf to have its Requested Instruction C on federal income tax submitted to the jury without evidence to support it.

3. Liepelt Cannot Be Retroactive Except in FELA Cases

The two cases cited by Gulf as to the retroactive application of *Liepelt—Lang v. Texas Pacific Railway Co.*, 624 F.2d 1275 (5th Cir. 1980) and *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72 (4th Cir. 1980), (Pet. for Cert., p. 18, 19)—are not *deux ex machina*. Alas, both are FELA cases applying federal, not state law.

CONCLUSION

For the reasons stated, the petition should be denied.

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of record for
Steven Gaedecke

Of Counsel:

GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that

(1) all parties required to be served in this proceeding have been served,

(2) Three copies of the foregoing Brief in Opposition of Steven Gaedecke were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Bradley A. Jackson, Esq.
Royston, Rayzor, Vickery & Williams
3710 One Shell Plaza
Houston, Texas 77002

Frank Caton, Esq.
Crain, Caton, James & Womble
Two Houston Center
Houston, Texas 77002,

(3) Service on each of such parties was made on October 31, 1980, by depositing said copies of this Brief in Opposition in a United States Post Office, first class postage prepaid, and addressed to the above-named counsel at their respective post office addresses listed above.

JOSEPH D. JAMAIL

APPENDIX A

2A Vernon's Texas Rules of Civil Procedure, p. 460 (1976)

Rule 276. Refusal or Modification

When an instruction, special issue, definition or explanatory instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon "Refused," and sign the same officially. If the trial judge modifies the same he shall indorse thereon "Modified as follows: (stating in what particular he has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, special issue, definition or explanatory instruction, when so indorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

APPENDIX B

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTIONS A, B AND C. FILED: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By. R. Trinkle, Deputy.

Requested Instruction No. A

In connection with the damage issues, you are instructed that any amounts allowed for:

a) physical pain and mental anguish in the future, and

b) loss of earning capacity in the future, and

c) loss of physical capacity in the future, and

d) medical and hospital care in the future,

must be such amounts as are the present value thereof, and reduced to such present value by the use of an appropriate interest rate, prevailing at the time and place of trial, at which money can be safely and securely invested, and the balance shall be your answer.

REQUESTED INSTRUCTION NO. B

In considering the issues submitted by the Court dealing with the question of amount of damages sustained by Stephen Gaedecke, if any, you are instructed that you are not to consider or speculate concerning future inflationary trends or possible future increases in earnings due to increases in productivity, that is you shall not speculate in projection of future damages, if any, about possible future inflationary trends or possible depressions or about possible future wage increases.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.

APPENDIX C

2 Vernon's Texas Rules of Civil Procedure,
p. 488 (1976)

Rule 184a. Judicial Notice of Law of Other States, Etc.

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review.

Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION, ET AL,
Respondents

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK CATON
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323
Counsel of Record for Mobil Oil Corporation

Of Counsel:

THOMAS B. GREENE, III
CRAIN, CATON, JAMES & WOMBLE
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
ARGUMENT	2
INTRODUCTION	2
I. THE FEDERAL DISTRICT COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OVER COMMON LAW NEGLIGENCE ACTIONS ARISING ON THE OUTER CONTINENTAL SHELF.	3
a. State Courts Have General and Concurrent Jurisdiction with the Federal Courts Over Common Law Negligence Actions.	3
b. Statutes Conferring Federal Jurisdiction Must Be Strictly Construed.	4
II. THIS COURT LACKS JURISDICTION TO CONSIDER THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT ANY AWARD OF DAMAGES WOULD NOT BE SUBJECT TO FEDERAL INCOME TAXATION.	7
III. PETITIONER WAS NOT ENTITLED TO THE SUBMISSION OF ITS REQUESTED JURY INSTRUCTION ON THE EFFECT OF FEDERAL INCOME TAXES.	8
IV. NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980) IS NOT APPLICABLE IN THIS COMMON LAW NEGLIGENCE ACTION.	9
V. DENIAL OF THE PETITION WOULD PREVENT AN INEQUITABLE RESULT.	10
CONCLUSION	11
APPENDIX A—Excerpt From State Court Brief	13
APPENDIX B—2A Vernon's Texas Rules Annotated, p. 403 (1976)—Rule 273. Special Charges	41
APPENDIX C—2A Vernon's Texas Rules Annotated, p. 460 (1976)—Rule 276. Refusal or Modification	42
APPENDIX D—Third Party Defendant's Requested Instructions A, B and C.	43

TABLE OF AUTHORITIES

CASES	Page
62 Cases of Jam v. United States, 340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 566 (1951)	5, 6
Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977)	8
Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971)	6, 10
Ex Parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949)	5
Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 94 S.Ct. 334, 414 U.S. 6, 39 L.Ed.2d 287 (1973)	5
First State Bank & Trust Co. of Edinburg v. George, 519 S.W.2d 198 (Tex. Civ. App.—Corpus Christi 1974), writ ref'd n.r.e.	7
Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1912)	4
Garcia v. Prescott, 570 S.W.2d 562 (Tex. Civ. App.—Corpus Christi, 1978), writ ref'd n.r.e.	8
J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR, 457 F.2d 815, (5th Cir. 1972), [en banc] reh. and reh. en banc den.	5
Johnson v. Penrod Drilling Co., 510 F.2d 234 (5th Cir.) [en banc], *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975)	9
McCord v. Dixie Aviation, 450 F.2d 1129 (10th Cir. 1971)	5
M.L.C. Loan Corp. v. P. K. Foods, Inc., 541 S.W.2d 902, 905 (Tex. Civ. App.—Beaumont 1976), no writ	7
Newman v. Dehli Gas Pipeline Co., 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974), no writ	7
Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 239, 57 L.Ed.2d 274 (1978)	4
Rice v. Minnesota and Northwest R.R. Co., 66 U.S. 358, 1 Black 358, 17 L.Ed. 147 (1862)	4
Robb v. Connolly, 111 U.S. 637, 4 S.Ct. 544, 28 L.Ed. 542 (1884)	4
Sheldon v. Sill, 49 U.S. (How) 441, 448, 12 L.Ed. 1147, 1151 (1850)	5
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950)	6
United States v. Bank of New York & Trust Co., 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936)	3

Page

UNITED STATES STATUTES

43 U.S.C. § 1331, *et seq.* ..... passim

TEXAS RULES OF CIVIL PROCEDURE

Rule 273 7
Rule 276 7

TEXTS

Hodges, *Special Issue Submission in Texas* 8

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION, ET AL,
Respondents

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

JURISDICTION

This Court lacks jurisdiction to review the trial court's refusal to instruct the jury that any award of damages would not be subject to federal income taxes.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal district courts have exclusive subject matter jurisdiction of cases and controversies arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq.?

2. Whether this Court has jurisdiction to review the trial court's refusal to instruct the jury that any award of damages would not be subject to federal income taxation where petitioner has failed to comply with the trial court's rules of procedure?

3. Whether federal common law established after the effective date of the Outer Continental Shelf Lands Act may be used to fill gaps in existing federal law and thereby pre-empt existing and otherwise applicable state law?

STATEMENT OF THE CASE

(Included in the excerpt of Respondent's State Appellate Court Brief which is attached as Appendix A.)

ARGUMENT

INTRODUCTION

The Outer Continental Shelf Lands Act does not explicitly or implicitly grant exclusive jurisdiction to the federal district courts over cases and controversies arising out of or in connection with any operation on the Outer Continental Shelf.

This Court is plainly and simply being asked to augment the language of a statute in order to effect an important and far-reaching change in legislation.

"Exclusive" is an adjective; a word used to limit or qualify. When it is used to limit or qualify a congressional grant of jurisdiction it does not have multiple meanings. It is plain, clear, and unambiguous. It does not require elucidation, explanation, or construction. Legislative grants of exclusivity can and usually do eliminate a privilege or franchise. It is an important, significant, and often drastic legislative act. The courts should not assume that responsibility.

I.

THE FEDERAL DISTRICT COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OVER COMMON LAW NEGLIGENCE ACTIONS ARISING ON THE OUTER CONTINENTAL SHELF.

a. State Courts Have General and Concurrent Jurisdiction with the Federal Courts Over Common Law Negligence Actions.

A grant of jurisdiction by Congress to the federal district courts does not, of itself, imply that the jurisdiction is to be exclusive. *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936). As this Court has stated:

> "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had

> the power to hear and determine causes of action created by Federal statute. *Robb v. Connolly,* 111 U.S. 637; 4 S.Ct. 544; 28 L.Ed. 542 (1884)."

Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U.S. 481, 490; 32 S.Ct. 205, 206, 56 L.Ed. 516 (1912).

Federal courts have no common law jurisdiction or power except that which is granted by express statutory language. *Rice v. Minnesota & Northwestern R.R. Co.,* 66 U.S. 358, 374, 1 Black 358, 374, 17 L.Ed. 147, 152 (1861). The federal courts had no jurisdiction over common law actions arising on the Outer Continental Shelf until they were granted jurisdiction under § 1333, subsection (b) of Title 43, United States Code. That Congress understood it was extending the jurisdiction of the federal district courts to the Outer Continental Shelf is clearly shown by the sectional analysis of the Senate Bill, S. 1901 as reported:

> "Subsection (b) of Section 4 *extends* original jurisdiction of the federal district courts to cases and controversies arising out of operations on the outer Continental Shelf. . . ." S. Rep. No. 411, 83rd Cong., 1st Sess. (1953). [Emphasis added]

b. Statutes Conferring Federal Jurisdiction Must Be Strictly Construed.

A congressional grant of jurisdiction may be general or limited, concurrent or exclusive. The jurisdiction of federal courts is limited not only by the provisions of Article III of the Constitution, but by acts of Congress. *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 372, 98 S.Ct. 239, 57 L.Ed.2d 274, 281.

Statutes conferring federal jurisdiction must be strictly construed. *McCord v. Dixie Aviation,* 450 F.2d 1129, 1131 (10th Cir. 1971).

Congress has granted exclusivity in a number of jurisdictional statutes. In doing so, it has routinely employed the term "exclusive"; *e.g.,* "The district court shall have original jurisdiction, exclusive of the courts of the state . . ."; "Exclusive jurisdiction in the district court or court of claims . . ."; ". . . Such jurisdiction shall be exclusive of the courts of the states . . ." Sections 1334 through 1361 (Chapter 85) of Title 28 of the United States Code.

It is well settled that if the statute being construed is unambiguous, legislative history may not be consulted to determine its meaning. *Ex Parte Collett,* 337 U.S. 55, 61, 69 S.Ct. 944, 93 L.Ed. 1207, 1211 (1949); *Espinoza v. Farah Mfg. Co.,* 462 F.2d 1331, 1333 (5th Cir. 1972), *aff'd,* 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed. 2d 287 (1973). It is the court's duty to ascertain the purpose of Congress from the plain words it used, neither to "add nor to subtract. . . ." *62 Cases of Jam v. United States,* 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566, 570 (1951). Where Congress has employed a term in one place but excluded it in another, it should not be implied where excluded. *J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR,* 457 F.2d 815, 818 (5th Cir. 1972), *reh. and reh. en banc den.*

Only Congress has the right to prescribe the jurisdiction of the federal district courts. If Congress does not intend to grant exclusive jurisdiction, then the courts may not infer it. *See, Sheldon v. Sill,* 49 U.S. (How.) 441, 448, 12 L.Ed. 1147, 1151 (1850).

Petitioner has failed to demonstrate any practical justification for creating exclusive federal jurisdiction over

common law negligence actions arising on the Outer Continental Shelf. We have historically maintained two separate and distinct lower court systems. Whenever a logical division of their jurisdiction is possible, distinct parameters should be drawn in order to assure that the court that is granted jurisdiction is competent to consider the case. In cases arising on the Outer Continental Shelf, a trial court, whether state or federal, must interpret federal statutory and common law, and state law which is adopted as surrogate federal law to fill the gaps in federal law. *See Chevron Oil v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Petitioner suggests that rather than interpret and apply federal statutory and common law, Texas and Louisiana common law, with the aid of factual issue determination by citizens of the Southern District of Texas, the Texas district court judge should have dismissed the original action, and required the plaintiff to file suit in a federal district court where another judge would undertake to interpret and apply the same bodies of law with the aid of fact finders who are also citizens of the Southern District of Texas.

Exclusive jurisdiction in the federal district courts would put a further burden on the already overloaded federal court dockets and create additional anomalies in the laws applied to workers on fixed as opposed to movable offshore drilling rigs. *See, Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 673, 70 S.Ct. 876, 94 L.Ed. 1194, 1200-1201 (1950). There is ". . . no justification so to distort the ordinary meaning of the statute. Nothing in the text or history of the legislation points to such a reading of what Congress wrote." *62 Cases of Jam v. United States, supra,* 340 U.S. at p. 600, 95 L.Ed. at p. 571.

II.

THIS COURT LACKS JURISDICTION TO CONSIDER THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT ANY AWARD OF DAMAGES WOULD NOT BE SUBJECT TO FEDERAL INCOME TAXATION.

Petitioner failed to comply with the Texas Rules of Civil Procedure and thereby waived any claimed error of the trial judge in refusing to instruct the jury that any award of damages would not be subject to federal income taxation. Rule 273, Texas Rules of Civil Procedure (Appendix B), requires that requests for instructions be made separate and apart from the objections to the charge. The requested instruction must be in writing. It is presented to the court and is used by the court in preparing its charge. Any adverse ruling by the judge should be written on the request as "refused" or "modified as follows: (stating in what particular he has changed or modified it) and given, and exceptions allowed." Rule 276, Texas Rules of Civil Procedure (Appendix C). The judge signs the request, and it then constitutes a bill of exceptions.

The record shows that the prescribed formalities were not complied with (Appendix D), and Petitioner has therefore waived error. *Newman v. Dehli Gas Pipeline Co.*, 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler, 1974), no writ. There was nothing for the appellate court to review. *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198, 205 (Tex. Civ. App. —Corpus Christi, 1974), writ ref'd n.r.e.; *M.L.C. Loan Corp. v. P.K. Foods, Inc.*, 541 S.W.2d 902, 905 (Tex. Civ. App.—Beaumont, 1976), no writ.

III.

PETITIONER WAS NOT ENTITLED TO THE SUBMISSION OF ITS REQUESTED JURY INSTRUCTION ON THE EFFECT OF FEDERAL INCOME TAXES.

Under Texas procedure, an instruction is proper only if it finds support in the evidence and the inferences to be drawn therefrom. *See, Bounds v. Caudle,* 560 S.W.2d 925, 930 (Tex. 1977); *Garcia v. Prescott,* 570 S.W.2d 562, 566 (Tex. Civ. App.—Corpus Christi, 1978), writ ref'd n.r.e.; Hodges, *Special Issue Submission in Texas* 34 (1959).

In *Liepelt,* this Court recognized that the calculation of the effect of income taxes on the decedent's past and future earnings was complicated and held that it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings. Such calculations are full of imponderables such as exemptions or exclusions, tax brackets, and the tax rate, all of which are subject to change. Although a jury's computation is not required to conform to strict mathematical calculation, it should be based on evidence and not pure speculation. The Court did not suggest that a jury instruction should be used as a substitute for the required proof. The court understood that expert testimony was essential to enable jurors to understand the calculations involved in estimating tax consequences, ". . . the trial bench has developed effective methods of presenting essential elements of an expert calculation in a form that is understandable by juries. . . ." *Norfolk & Western Railway Co. v. Liepelt,* 100 S.Ct. 755, 758 (1980). Evidence of the impact of future income tax

in calculating a damage award is a prerequisite to an instruction.

An instruction to the effect that awards received by settlement or verdict in personal injury actions are not taxable under the federal income tax laws, if unsupported by evidence which would aid the jury in making future predictions of tax consequences, would allow the very speculation which the court has held were too complex for a jury's deliberations. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236-37 (5th Cir.), (en banc) *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 69, 46 L.Ed.2d 58 (1975).

The trial court had no discretion to give the requested instruction. It would have been error to do so.

The kind of proof offered in *Liepelt* and approved by the court is not included in the trial court record. Section 104(a)(2) of the Internal Revenue Code which provides that awards received by settlement or verdict in personal injury actions are not taxable was not offered at trial.

IV.

NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980) IS NOT APPLICABLE IN THIS COMMON LAW NEGLIGENCE ACTION.

Where a federal statute creates a wholly federal right but specifies no particular statute of limitations, the general rule is to apply the limitations statute prescribed for analogous actions by the state in which the cause of action arose. A special federal prescription period is created, as federal common law, only when there is a compelling need for uniformity or the nature of the federal right demands a particular sort of prescriptions

period. *Chevron Oil v. Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296, 304 (1971).

Where Congress has specifically rejected national uniformity and affirmatively provided for the application of state law, then any attempt to create a federal common law rule on a perceived need for uniformity is not within the authority of the courts.

V.

DENIAL OF THE PETITION WOULD PREVENT AN INEQUITABLE RESULT.

On September 8, 1978, three years after Gaedecke's injury, and eighteen months after filing its original answer, Gulf Offshore filed its First Amended Answer in which it raised for the first time its plea to the jurisdiction of the State District Court. The State District Court, with authority to do so, held that it had jurisdiction over the parties and the subject matter of Gaedecke's cause of action.

In reliance on the plain wording of the statute, and on the trial court's denial of Gulf Offshore's plea to the jurisdiction, Gaedecke and Mobil entered into a pre-trial agreement whereby Mobil's liability to the plaintiff would be limited to $200,000.00 in the event that Mobil was not awarded indemnity from Gulf Offshore.

Gaedecke's original Judgment against Mobil has become final. If this Court declares that the courts of the State of Texas have no subject matter jurisdiction to hear causes of action filed pursuant to the Outer Continental Shelf Lands Act, the defense of *res judicata* will be applicable, and the plaintiff will be prevented from

refiling his action in the Federal District Court. Although Mobil's action for indemnity would still be viable, prosecution of the indemnity action would require a duplication of the great amount of time and expense involved in the original preparation and trial of this case. It would also involve a substantial risk that the indemnity action would be unsuccessful thereby reducing plaintiff's recovery by more than 80%.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANK CATON
THOMAS B. GREENE, III
Attorneys for Respondent,
Mobil Oil Corporation

Of Counsel:

CRAIN, CATON, JAMES & WOMBLE
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

APPENDIX A

EXCERPT FROM STATE COURT BRIEF

FACT STATEMENT

(The Statements contained in Gulf Offshore's General Fact Statement which should have been omitted because they are unsupported by the record are encolsed in brackets and appear in bold type, new matter which has been added by Mobil is italicized, and those statements contained in Gulf Offshore's Fact Statement which are not disputed are in roman).

On the 9th day of July, 1974, Defendant Mobil and Third-Party Defendant Gulf Offshore entered into contract number 1159, which concerned oil well completion operations to be performed by Third-Party Defendant Gulf Offshore on Defendant Mobil's platform wells situated in Grande Isle Block 95 Offshore of the State of Louisiana (DX-3, Tr. 250).

Paragraph 15.4 of the contract was a hold harmless clause running in favor of Defendant Mobil placing responsibility on Gulf Offshore for personal injuries "growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Third-Party Defendant Gulf Offshore under the contract (DX-3, Tr. 257). **[Exhibit B to the contract, which was a boiler plate form drawn by Mobil, and referred to throughout the contract as "attached hereto and made a part hereof" set forth insurance requirements and provided for $100,000 each person", bodily injury liability insurance under a comprehensive liability policy to include, inter alia, "Contractual liability to cover 'hold harmless' clause in our contract" (Tr. 269).]**

Paragraph 15.3 of the Contract permitted Gulf Offshore to be a self-insurer. (DX-3, Tr. 257). *Gulf Off-*

PREVIOUS PAGE WAS BLANK

shore did not purchase liability insurance coverage to cover the "hold harmless" clause in the contract. (Supp. Tr. 85, 86).

Paragraph 12.2 of the contract provided that Gulf Offshore would exercise control over and be responsible for all of its employees who engaged in assisting independent contractors such as service boat operators in performing their services. (DX-3, Tr. 256). *Mobil had no right to direct or control Gulf Offshore's employees except in the results to be obtained.* (DX-3, Tr. 256).

The contract further provided that transportation to and from the platform was **[the work of]** *to be arranged and paid for by* Defendant Mobil (DX-3, Tr. 265), and that Third-Party Defendant Gulf Offshore was to be paid at a reduced rate when, at Defendant Mobil's direction, operations *including evacuation,* were suspended due to weather requiring the rig to be shut down and evacuated. (DX-3, Tr. 252).

Gulf Offshore began performing its work for Mobil at least a year before the accident. (S.F. 152, 155, DX-3). Employees at Gulf Offshore regularly and routinely assisted the boat operator which serviced the drilling platform to load and discharge cargo and personnel, and to handle lines. (S.F. 42, 43, 47, 160, 161, 207, 225, 226, 293, 314). The work which the plaintiff was doing at the time of his accident was the same kind of work he had done many times. (S.F. 217 and 218).

The Evacuation and Accident

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula into the Gulf of Mexico and regained strength necessitating evacuation of offshore oil platforms in the Gulf, including the platform upon which

Third-Party Defendant Gulf Offshore was performing its completion work for Defendant Mobil (PX-1, S.F. 124, 1.2-8).

Evacuation was to be pursuant to Defendant Mobil's hurricane action plan (PX-2), Defendant was to furnish the transportation for evacuation, **[and Defendant Mobil was responsible for determining when and how the platform would be evacuated (S.F. 153).]** Pursuant to its transportation **[and evacuation]** obligation, Defendant Mobil had arranged for an offshore work boat called the SALTON SEAHORSE, owned and operated by Levy, to stand by for the evacuation (S.F. 32). **[Third-Party Defendant Gulf Offshore had no work to perform with respect to the SALTON SEAHORSE and had nothing to do with its operation (S.F. 205-206).]**

Following preparation for evacuation, **[all activity on the platform ceased]**, all machinery was shutdown, and after evacuation *from the platform* of all but two of the platform workers *employed by Gulf Offshore* by use of the crane, even its generator was shut off (S.F. 186).

During evacuation which took place in the morning on September 22, 1975, Plaintiff was injured. *A short time* prior to his accident, Plaintiff had been safely evacuated from the platform to the work boat by the crane (S.F. 280). *The evacuation continued and* as the last two workers, the crane operator and his helper, attempted to evacuate the platform using a rope to swing from the lowest level of the platform to the after deck of the M/V SALTON SEAHORSE (S.F. 146), the Plaintiff heard *someone* **[who he believes was the Captain of the vessel]** yell down to him to go aft and provide assistance, *but he would have done so without instructions because that was the normal thing to do (S.F. 281).*

It would not have made any difference who yelled at him because he would have gone back to help anyway unless someone grabbed him. (S.F. 294) Plaintiff was swept along the after deck of the vessel and ended up against a pallet loaded with sand when a large wave washed across the aft area of the vessel where he had positioned himself **[following the Captain's command]** (S.F. 283).

The Litigation

Plaintiff sued Defendant Mobil and L. A. Levy, Inc., and Arthur Levy Boat Service, Inc. and Offshore Crews, Inc., for personal injuries sustained as a result of the accident (Tr. 2-7). *Defendant Mobil made a written demand on Gulf Offshore for defense and indemnity* (DX-1), *and after its demand was rejected* (DX-2), Defendant Mobil filed a Third-Party Complaint against Third-Party Defendant Gulf Offshore, alleging liability for indemnity on both tort and contract theories (Tr. 19-21). *Gulf Offshore's Original Answer was a general denial filed on March 28, 1977. On September 8, 1978, eighteen months after filing its original answer and less than ten weeks prior to trial, Gulf Offshore filed its First Amended Answer in which it raised for the first time its plea to the jurisdiction and its special exceptions, including the contention that the Plaintiff was injured while not engaged in operations pursuant to the contract between Mobil and Gulf Offshore (Tr. 38-40).*

Third-Party Defendant conducted no pre-trial discovery (Tr.).

Prior to trial, Plaintiff settled with Defendant Mobil and the Levy Defendants, **[which had assumed Mobil's defense]**. Plaintiff non-suited the Levy Defendants pursuant to **[the]** *his settlement with Levy* **[which further**

contemplated a guarantee to the Plaintiff of at least $100,000.00, a maximum ceiling on Defendant Mobil's liability of $200,000.00, Defendant Mobil's exculpation from liability in the event it secured its indemnity from Third-Party Defendant Gulf Offshore and the supplying of three witnesses to the Plaintiff by Defendant Mobile (S.F. 3-8)] *In consideration of the non-suit, the Levy Defendants guaranteed the Plaintiff a recovery of $100,000.00 (S.F. 6). The Plaintiff then agreed that if Mobil was not awarded indemnity from Gulf Offshore, that Mobil's liability to the Plaintiff would be limited to $200,000.00 (S.F. 6). Mobil agreed to make its three employee witnesses available for trial (S.F. 8). It was also pointed out on the record that Mobil was an additional insured on the Levy insurance policy (S.F. 8). A full disclosure of the settlement agreement between the Plaintiff and Mobil was made on the record and counsel for Gulf Offshore was given a full opportunity to question the attorneys for Plaintiff and Mobil with regard to the terms of the agreement (S.F. 3-8). Gulf Offshore did not request a postponement or a continuance, did not move to sever the indemnity action, and did not move to file a cross-action against the Levy Defendants.* Prior to voir dire examination of the jury panel, the district court assigned twelve peremptory challenges to the Plaintiff and six peremptory challenges to Defendant Mobil, against six peremptory challenges assigned to Third-Party Defendant Gulf Offshore. *After voir dire examination of the jury panel, and before jury selection, Third-Party Defendant made no complaint nor motion. After the jury was selected and empaneled, Third-Party Defendant Gulf Offshore made an unsuccessful attempt to show that the Plaintiff and Mobil had additional agreements regarding trial strategy which had not been*

disclosed (S.F. 9-13) At the same stage Gulf Offshore moved for leave to file a trial amendment and stated that it intended to offer proof of fraud and collusion on the part of the lawyers for Plaintiff and Mobil (S.F. 12).

At the trial, *Defendant Mobil presented proof of the indemnity and hold harmless agreement between Mobil and Gulf Offshore, and the performance by Gulf Offshore of operations contemplated by the contract;* and Defendant Mobil did not contest liability, causation or damages and **[argued for]** *did not argue against* findings favorable to the Plaintiff on the issues against it (Jury Argument 27-28). *Gulf Offshore made no objection to the jury argument of Mobil* (Jury Arguments 23-30, A-6). *Gulf Offshore called no witnesses to the stand and offered no deposition testimony; its only offer of evidence was Mobil's Answers to Plaintiff's Interrogatories Nos. 3, 4, 5 and 7 (S.F. 329-331). No objection was made by Gulf Offshore to Mobil's offer of Defendant's Exhibit 3, the contract between Mobil and Gulf Offshore. (S.F. 324-325). Gulf Offshore made no offer of evidence concerning the settlement agreements between Plaintiff and the original defendants* (S.F.). *At the close of the evidence, Gulf Offshore filed its trial amendment but withdrew Paragraph I of that pleading which contained its allegations of fraud and collusion* (Tr. 185).

Following return of the jury verdict, but before entry of final judgment, it was discovered that Exhibit B to the contract was not physically attached to the copy of the contract admitted into evidence. In a post-trial proceeding, the district court permitted Exhibit B to the contract to be filed **[as a part of the trial record]** along with an affidavit and the court reporter's notes on the proceeding (Motion to Amend S.F. 17-18), *but not as a part of the trial record.*

REPLY POINT 1
(Restated)

The Court of Civil Appeals correctly held that the trial court had subject matter jurisdiction of this case.

(Reply to Petitioner's First Point)

ARGUMENT AND AUTHORITIES UNDER REPLY POINT 1

In an effort to lend some order to its argument, Mobil will discuss chronologically the contemporary and legislative history of the Outer Continental Shelf Lands Act, and the opinions which have attempted to interpret its jurisdictional provisions.

1945

In 1945, President Truman issued a proclamation on the Continental Shelf stating that the Government of the United States "regards the natural resources of the subsoil and seabed of the Continental Shelf beneath the high seas contiguous to the coasts of the United States and appertaining to the United States, subject to its jurisdiction and control." Executive Order 9633, Federal Register 12304 (1945); 59 Stat. 885. The claim of the United States was subsequently recognized by the Geneva Convention on the Continental Shelf.

The Continental Shelf is that part of the continent overlapped by the oceans. In the Gulf of Mexico the average distance from shore to the outer edge of the shelf is approximately 93 miles. The portion of the shelf which lies within historic state boundaries, or three miles from

shore, is estimated to contain less than ten (10%) per cent of the total area of the shelf.

1947-1950

Following the presidential proclamation and the recognition of the claim of the United States by the Geneva Convention on the Continental Shelf, various jurisdictional problems arose between the Federal Government and certain state governments concerning the mineral rights on the Continental Shelf. In 1947, the U. S. Supreme Court overruled prior decisions, and held that the Federal Government had "paramount rights", and that the States had no title to, or property interest in the submerged lands off their respective coasts outside inland waters; only the Federal Government had such proprietary interests. *United States v. California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

It was recognized that there were conflicting views as to whether or not it was necessary for the U. S. Congress to explicitly confer authority to the executive branch and particularly the Department of the Interior to regulate offshore activity.

1948

In 1948, Title 28 of the United States Code, entitled "Judicial Code and Judiciary", was revised and codified. Sections 1334 through 1361 (Chapter 85) relate to the jurisdiction of the Federal District Courts over various cases and controversies. Congress expressed its intent to grant exclusive jurisdiction to the Federal District Courts in many of the statutes. In so doing, Congress used explicit language: *e.g.*, "The District Courts shall have orig-

inal jurisdiction, exclusive of the courts of the States. . . ."; "Exclusive jurisdiction in the District Court or Court of Claims. . . ."; ". . . such jurisdiction shall be exclusive of the courts of the States. . . ."

1953

Two acts were passed in 1953 to clarify the distinction in federal-state control over the outer Continental Shelf. The Submerged Lands Act of 1953 gave the coastal states exclusive rights to the resources of the Continental Shelf up to three geographical miles from their coasts. Pub.L. No. 31, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* (1953). That act also reaffirmed the jurisdiction, power and control of the United States beyond that point. In effect, the act established the boundaries of the federal and state governmental jurisdiction over the seabed and subsoil of the shelf. There were no provisions for the leasing and development of the area by the Federal Government nor were provisions made for the exchange of state leases for federal leases in the same area. The Outer Continental Shelf Lands Act of 1953 had as its principal purpose the accomplishment of those objectives [1953]. U.S. Code Cong. & Ad. News 2177, 2177-2178.

1965

The revised federal jurisdictional statutes and the Outer Continental Shelf Lands Act had been in effect for seventeen years and twelve years, respectively, when an intermediate appellate court of the State of Louisiana rendered its opinion in *Gravois, et al v. The Travelers Indemnity Company, et al,* 173 So.2d 550 (La. App. 1965, writ ref'd, 247 La. 1016, 175 So.2d 301). The case arose

out of a fatal injury occurring on a fixed platform on the outer Continental Shelf. Suit was filed in a Louisiana state court. The original defendant filed a plea to the jurisdiction. The trial court found that it had jurisdiction but dismissed the plaintiff's claim after finding that the defendants were free of any negligence. The plaintiff appealed. Apparently neither of the attorneys took the defendants' exception to the jurisdiction seriously. According to the appellate court, "The question of jurisdiction is treated by both parties in an offhanded manner and it could almost be said that the defendants have abandoned their argument on the question of jurisdiction." *Id.* at 553.

The majority opinion overruled the lower court and held that the Federal District Court had jurisdiction of the cause of action exclusive of the state courts. The court relied on the language of 28 U.S.C. § 1333(a), the Fifth Circuit's decision in *Pure Oil Company v. Snipes,* 293 F.2d 60 (5th Cir. 1961), and the absence of a clear grant of concurrent jurisdiction to the state courts. According to the court, 28 U.S.C. 1333(a)(2), "strongly implies, though it does not explicitly declare exclusive jurisdiction", 173 So.2d at 555. However, jurisdiction of state courts is not defeated by implication. *Galveston, H. & S. A. R. R. Co. v. Wallace,* 117 S.W. 169 (Tex.) *aff'd,* 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1911).

The second basis for the court's holding was the Fifth Circuit's decision in *Pure Oil* that only federal maritime law was applicable under the Outer Continental Shelf Lands Act and, therefore, under § 1331(1) the Federal District Courts would have original jurisdiction exclusive of the courts of the State. But federal maritime law is not the exclusive body of law applicable to causes of

action arising on the outer Continental Shelf. *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Further, as is ably pointed out in the dissenting opinion in *Gravois,* "The majority error . . . consists in the failure to distinguish between the question of exclusive original Federal jurisdiction and that of the law applicable irrespective of the tribunal wherein the suit may be prosecuted." 173 So.2d at 559.

The majority statement that it is the "clear intent" of the Act to vest all civil and political jurisdiction exclusively in the Federal District Courts is either: 1) a statement that the language of the quoted sections is clear and unambiguous, or 2) that the court has arrived at the intent of Congress from the language of the quoted sections themselves. If the language is clear and unambiguous, congressional intent should play no part in determining what the statute means. Conversely, if the intent of Congress was to be inquired into in order to determine the meaning of statutory language, the accepted canons of statutory construction should have been applied.

The Fifth Circuit Court of Appeals in the *Pure Oil v. Snipes* case did not hold that only federal maritime law was applicable to the outer Continental Shelf. It only held that state law could not apply if it were found to be inconsistent with federal law within the meaning of 43 U.S.C.A. § 1333(a)(2). As stated by the Honorable Ross N. Sterling, in *Friedrich v. Whittaker Corporation,* 467 F.Supp. 1012 (S.D. Tex. 1979), discussed in more detail *infra,* the *Gravois* case is the only case where a court has directly faced the issue of exclusive federal court jurisdiction on the outer Continental Shelf. He further pointed out that "the thoughtful dissent in that case dem-

onstrates that there is room for disagreement as to the intent of Congress in this regard." *Id.* at 1015.

1972

Seven years passed before the jurisdictional provisions of the Outer Continental Shelf Lands Act were again considered in a reported case. Gulf Offshore has cited the annotation at 30 A.L.R. Fed. 535 (1976) which in turn relies on Judge Rubin's decision in *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), in support of its argument that the federal courts have exclusive jurisdiction of all causes of action arising out of operations conducted on the outer Continental Shelf. Again, the Honorable Ross N. Sterling pointed out in *Friedrich v. Whittaker* that Judge Rubin did not hold in *Fluor* that federal courts had exclusive jurisdiction in such cases, but merely held that Federal courts had original jurisdiction, 467 F.Supp. at 1015.

The *Fluor* case arose out of a contract to furnish equipment and personnel for use in raising a sunken drilling platform on the outer Continental Shelf. The defendant removed the case to the Federal District Court for the Eastern District of Louisiana. The plaintiff filed a motion to remand contending that the activities contemplated under the contract were only *indirectly* related to operations on the outer Continental Shelf and there was therefore no *original* jurisdiction in the Federal District Court. Under the provisions of 28 U.S.C. § 1441, any action brought in a State Court of which the Federal District Court has *original* jurisdiction may be removed to the Federal District Court. In order to deny the plaintiff's motion to remand to the state court, all that Judge Rubin

had to determine was whether the Federal District Court had *original* jurisdiction. Judge Rubin held that his court had *original* jurisdiction. In arriving at his conclusion that his court had original jurisdiction, Judge Rubin found that it was not necessary that operations conducted on the outer Continental Shelf for the purpose of developing mineral resources be *directly* related to operations on the shelf, that it was sufficient that such activities be *indirectly* related to such operations. The court stated specifically that "*the issue* (emphasis added) presented by the motion to remand is whether this is a case 'arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources.' " 341 F.Supp. at 759. The court thus acknowledged that the question of exclusivity of federal jurisdiction was not even an issue in the case. Nevertheless, the court commented on the exclusivity issue presently before this court. He relied upon three basic premises for his comments: (1) the language of 43 U.S.C. §§ 1332, 1333 (a)(1)(2)(3), § 1333(b) and 43 U.S.C. § 155, (2) the extension to the outer Continental Shelf of other federal legislation including the Longshoremen's and Harborworkers' Compensation Act, the National Labor Relations Act, OSHA, etc.; and (3) that a single federal forum would be more appropriate than multiple state forums to decide disputes that arise on the outer Continental Shelf. Judge Rubin's comments are based on his interpretation of congressional intent and his apparent belief that the Federal District Courts have some special competence that state courts do not have to hear and decide causes of action arising out of operations on the outer Continental Shelf. Since Judge Rubin held only that his court

had original jurisdiction, he simply denied the plaintiff's motion to remand. Had he held that federal district courts had exclusive jurisdiction, he would have been required to dismiss the plaintiff's action as Judge Sterling did in the *Friedrich* case.

If Judge Rubin was accurate in stating that the language of the jurisdictional provisions is clear and unequivocal, he had no need to resort to a determination of congressional intent. Again, if congressional intent was in question, the standard rules of statutory construction should have been applied.

The dissent in the *Gravois* case is a clear refutation of Judge Rubin's comments concerning a single federal forum. The fact that the outer Continental Shelf is to be treated as if it were an area of exclusive federal jurisdiction located within a state does not require resort to a federal court. The state courts have historically exercised general jurisdiction over civil cases arising in federal enclaves such as military installations and national parks. This has been particularly true in the case of negligence actions.

With respect to Judge Rubin's comment that one federal forum would be more appropriate to controversies arising out of activities on the outer Continental Shelf, it should be noted that in the Fifth Federal Judicial Circuit alone there are at least eleven separate districts which include twenty divisions employing more than fifty district judges, who from a practical standpoint are "one federal forum" in name only. Federal Courts are required to interpret and apply state statutes, and state courts are routinely required to interpret and apply federal statutes on an almost daily basis. Irrespective of the forum which might have been chosen by the plaintiff in the present

case, the same law would have been applicable. Congress has expressly provided in the Outer Continental Shelf Lands Act that various state laws are to be applied where they do not conflict with federal law. Congress was not afraid of the "shifting policies of adjacent states" in specifying the substantive law to be applied. It is therefore unlikely that Congress would be concerned that the shifting policies of various forums, federal and state, would be applied in adjudicating causes of action.

Four months after his decision in the *Fluor* case, Judge Rubin decided *Borne v. Tenneco Oil Company,* 1973 A.M.C. 388 (E.D. La. 1972), also relied on by Gulf Offshore in support of its position that the federal courts have exclusive subject matter jurisdiction of this controversy. Judge Rubin simply stated in *Borne* that "[t]hat Act, 43 U.S. Code, § 1333(b), confers exclusive jurisdiction on the U. S. district courts 'of cases and controversies arising out of or in connection with *any operations conducted on* the outer Continental Shelf. . . .'" *Id.* at 389 (emphasis supplied by Rubin). The statement is made without any citation of authority even to the court's own gratuitous comment in the *Fluor* case. According to Gulf Offshore, Judge Rubin's unnecessary comment in the *Fluor* case now forms the basis for its statement that "interpreting case law and secondary source material clearly reflect the exclusivity of federal court jurisdiction over matters pertaining to fixed platforms on the outer Continental Shelf" (Appellant's brief at 24). "It is unnecessary to go further than the wording itself." It is not the wording of the Act which Gulf Offshore asks the Court to rely on, but the absent word "exclusive".

It seems clear that since the language of the Outer Continental Shelf Lands Act does not specifically grant

exclusive jurisdiction to the Federal District Court it must be presumed that the Congress did not intend to convey that meaning. If it had intended to convey that meaning, it would have simply said so, as Congress did in the revision and codification of the federal jurisdictional statutes set out in Chapter 85 of Title 28, United States Code.

It is well settled that if the statute being construed is unambiguous, then a court cannot look to its legislative history. *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 94 S.Ct. 334, 414 U.S. 6, 38 L. Ed.2d 287 (1973); *Ex Parte Roloff*, 510 S.W.2d 913 (Tex. 1974). *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99 (1961); *Texas Health Facilities Commission v. El Paso Medical Surgical Associates*, 573 S.W.2d 291 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *Ringo v. Gulf States Utilities Co.*, 569 S.W.2d 31 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

If this statute is deemed ambiguous then the traditional canons of construction control the method of interpretation. They require reference, among other things, to the following: (1) the purpose of the legislation, *City of Irving v. Dallas County Flood Control Dist.*, 377 S.W.2d 215 (Tex. Civ. App.—Tyler 1964), *rev'd on other grounds*, 383 S.W.2d 571 (Tex. 1964); (2) contemporary and legislative history, *Texas Medical Branch at Galveston v. U.S.*, 557 F.2d 438 (5th Cir. 1977), *cert. denied* 99 S.Ct. 84 (1978); (3) legislative policy, *Miller v. Calvert*, 418 S.W.2d 869 (Tex. Civ. App.—Austin 1967, no writ); (4) similar statutes, *Shaddix v. Kendrick*, 430 S.W.2d 461 (Tex. 1968); (5) current business usage;

(6) presumptions; (7) omissions, *Simmons v. Armin,* 110 Tex. 309, 210 S.W. 266 (1920); (8) administrative construction, *Brennen v. Goose Creek Consol. Indept. School Dist.,* 519 F.2d 53 (5th Cir. 1975); (9) judicial construction, *Allen Sales & Service, Inc. v. Ryan,* 525 S.W.2d 863 (Tex. 1975); and (10) statutory amendments, *City of Ingleside v. Johnson,* 537 S.W.2d 145 (Tex. Civ. App.—Corpus Christi 1976, no writ).

The purpose of the Outer Continental Shelf Lands Act was to declare the sovereignty of the United States over the subsoil and seabed of the outer Continental Shelf lands lying seaward and outside of state waters, and to establish general guidelines and directives for the Secretary of Interior in managing the natural resources of the outer Continental Shelf. Rep. No. 1835, 95th Cong., 2nd Sess. (1978). *Report on the Activities of the Ad Hoc Select Committee on the Outer Continental Shelf of the House of Representatives.*

Contemporary and legislative history of the Act fails to disclose a congressional intent to vest exclusive jurisdiction in the federal district courts. Prior to and at the time of consideration and passage of the Outer Continental Shelf Lands Act, Congress may be presumed to have had knowledge of the executive declaration by President Truman, the decisions of the U. S. Supreme Court in *U. S. v. California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947); *U. S. v. Louisiana,* 339 U.S. 699 (1950); *U. S. v. Texas,* 339 U.S. 707, 70 S.Ct. 914, 94 L.Ed. 1216 (1950); the 1945 revision of the federal district court jurisdictional statutes in Chapter 85, Title 28 U.S. Code, and the widespread media coverage of the federal-state controversy over offshore mineral rights,

Allen Sales and Servicenter, Inc. v. Ryan, 525 S.W.2d 863 (Tex. 1975); *Marmon v. Mustang Aviation, Inc.,* 430 S.W.2d 182 (Tex. 1968); *Houston Mobilfone, Inc. v. Public Utility Commission,* 565 S.W.2d 323 (Tex. Civ. App.—Eastland 1978, no writ); *Dobbins v. United Super Markets,* 556 S.W.2d 387 (Tex. Civ. App.—Amarillo 1977, writ dism'd.); *Texas Emp. Ins. Ass'n v. Haunschild,* 527 S.W.2d 270 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). Prior to final passage of the Act, the Chairman of the Senate Committee on Interior and Insular Affairs asked the U. S. Attorney General to compare the Senate and House versions of the proposed Act and offer his comments and suggestions. In reply, the Attorney General stated:

> "S.1901, § 4(b) provides for jurisdiction and venue in Federal District Courts for controversies arising in connection with operations on the outer Continental Shelf, or involving rights there. Section 13 of the House bill makes a similar provision, but only as to proceedings involving a lease or rights under a lease on the outer Continental Shelf. The broader form of the Senate version is preferable, but might itself be broadened to include *all causes of action* (emphasis added) arising on the outer Continental Shelf or structures thereon." S. Rep. No. 411, 83rd Cong., 1st Sess., 33 (1953).

In his Minority Report, Senator Russell B. Long of Louisiana commented that the Senate Committee amendments (doing away with admiralty and maritime jurisdiction) were a vast improvement over the original draft, but decried the overall effect of the Act in allowing the Federal Government to confiscate the mineral resources on the outer Continental Shelf without compensation to

the states. He pointed out that the employees of the offshore operating and drilling companies would be citizens of the adjacent states, particularly Louisiana, and would benefit from the services and facilities provided by state taxpayers. He specifically commented that: "Louisiana provides a system of courts in which the employee will litigate many of his claims", and again, "the Company will make use of our courts." S. Rep. No. 11660, 83rd Cong., 1st Sess. 65 (1953). It is apparent from the Attorney General's letter that he wanted Congress to vest exclusive jurisdiction in the federal district courts, and asked for (but failed to get) specific language which would accomplish his wishes. It is also apparent from Senator Long's minority report that he, a member of the Committee that wrote the Senate version of the Act, understood that State courts would be adjudicating the personal injury actions of offshore workers.

In view of all of the above, it must be presumed that Congress acted deliberately, purposefully, and selected the language of the act with care. *Jessen Associates, Inc. v. Bullock,* 531 S.W.2d 593 (Tex. 1975); *Perkins v. State,* 367 S.W.2d 140 (Tex. 1963); *Morter v. State,* 551 S.W.2d 715 (Tex. Crim. App. 1977); *Miller v. Texas Employers' Ins. Ass'n,* 488 S.W.2d 489 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

The word "exclusive" and the phrase "exclusive of the courts of the states" are clear and unambiguous, and were of long and frequent usage in federal jurisdictional statutes before the Act was considered by Congress. The existence or nonexistence of a particular congressional intent may be inferred if the act under consideration does not contain a certain provision, particularly a phrase of

long and frequent usage. *Red River National Bank v. Ferguson,* 109 Tex. 287, 206 S.W. 923 (1918); *Oden v. Gates,* 119 Tex. 76, 24 S.W.2d 381 (1930); *State v. Jones,* 570 S.W.2d 122 (Tex. Civ. App.—Austin 1978, no writ); *Shell Oil Co. v. Federal Energy Adm.,* 400 F. Supp. 964 (S.D. Tex. 1975). In order to vest the federal district courts with exclusive jurisdiction over all causes of action arising on the outer Continental Shelf, the courts must either supply the omitted word "exclusive" or the phrase "exclusive of the courts of the states", or imply a congressional intent as did the Louisiana court in *Gravois.* Again, under the traditional canons of statutory construction, it is not ordinarily permissible to supply an omission. *Simmons v. Armin,* 110 Tex. 309, 210 S.W. 266 (1920); *Gilmore v. Waples,* 108 Tex. 167, 188 S.W. 1037 (1917); *Simmons v. Armin,* 110 Tex. 309, 210 S.W. 266 (1920); *Texas Pipe Line Co. v. Calvert,* 510 S.W.2d 168 (Tex. Civ. App.—Austin) *rev'd on other grounds,* 517 S.W.2d 777 (Tex. 1974); *A. M. Servicing Corp. of Dallas v. State,* 380 S.W.2d 747 (Tex. Civ. App. —Dallas 1964, no writ). Courts are not permitted to legislate; they must accept statutes as written. *Texas Employers' Insurance Association v. Shirey,* 391 S.W.2d 75 (Tex. Civ. App.—Austin 1965, no writ).

The fact that original statutory language has been modified in a subsequent amendment may also be considered to ascertain legislative intent. *Allen Sales Servicenter, Inc. v. Ryan,* 525 S.W.2d 863 (Tex. 1975); *Marmon v. Mustang Aviation, Inc.,* 430 S.W.2d 182 (Tex. 1968); *Reynolds v. State,* 547 S.W.2d 590 (Tex. Crim. App. 1976); *In Re Corrigan's Estate,* 517 S.W.2d 817 (Tex. Civ. App. —Tyler 1974, no writ); *Lumberman's Underwriter's v.*

State Bd. of Ins., 502 S.W.2d 217 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). The omission of a significant word from an amendment indicates a desire to change the effect or the interpretation of the Act. *Haverbekken v. Hale,* 109 Tex. 106, 204 S.W. 62 (1918); *City of Ingleside v. Johnson,* 537 S.W.2d 145 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Putman Supply Co. v. Chapman,* 45 S.W.2d 283 (Tex. Civ. App.—Eastland 1932), *affirmed* 76 S.W.2d 469 (Tex. Com. App. § A 1934).

With the exception of the Deepwater Port Act passed in 1975 requiring that state laws applicable to the outer Continental Shelf activities be continually updated, the Outer Continental Shelf Lands Act remained without change until 1978.

1978

On September 18, 1978, Congress amended the Act. Section 1333 subsection (b) of the original Act was entitled "Jurisdiction of United States District Courts" and provided that: "The United States District Courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf. . . ." The 1978 amendments incorporated a new jurisdictional provision in § 1349, subsection (b)(1) of the Act entitled "Jurisdiction and Venue of Actions." The new amendment provides: "The District Courts of the United States shall have jurisdiction of cases and controversies arising out of, . . ." There is nothing in the legislative history which explains why the word "original" was omitted from the 1978 amendments. Throughout the twenty-six year period

from passage of the original act until consideration of the 1978 amendments, lawsuits based on controversies arising out of activities on the outer Continental Shelf were being filed in various state courts. This fact was mentioned in the 1978 Senate debate on the accelerated leasing program and its environmental effects.

> "This list does not include the countless number of suits that have been filed in various state courts." Congressional Records, August 22, 1978, P. S13995.

The impediment to the accelerated leasing program caused by the countless lawsuits in the federal and state courts was the impetus for the new section 1349 of the Act which provides for citizens' suits, and which contains the revised jurisdiction and venue provision. H. R. Rep. No. 1835, 95th Cong., 2nd Sess. (1978).

1979

Judicial construction of a statute may be looked to in determining congressional intent. Twenty-six years have passed since the Act became effective. No state court of last resort has interpreted its jurisdictional provisions. No United States Court of Appeals has faced the jurisdictional issue which must be resolved by this honorable court. On March 27, 1979, the first opinion by a court sitting in Texas, addressing this jurisdictional issue was entered by the Honorable Ross N. Sterling, of the United States District Court for the Southern District of Texas in *Friedrich v. Whittaker Corporation,* cited by Gulf Offshore. In his opinion, Judge Sterling noted that Judge Rubin's opinion in the *Fluor* case did not hold that the Federal Courts had exclusive jurisdiction over the outer Continental Shelf;

that the Louisiana Court in *Gravois v. Travelers Indemnity Co.* was the only court to directly face the issue; and stated that ". . . the thoughtful dissent in that case (*Gravois*) demonstrates that there is room for disagreement as to the intent of Congress in this regard," 467 F.Supp. at 1015. Judge Sterling then clearly stated his reason for holding that exclusive jurisdiction of that cause was in the federal courts and that the state courts had no jurisdiction:

> "If this case were remanded there could be no appeal from the order of remand and the question of the exclusivity of federal court jurisdiction would have to make its way through the state courts with only a mere possibility of resolution by a federal court, where the decision should be made, on a petition for certiorari to the Supreme Court after the state courts have had their say. A dismissal by this court at this stage on the grounds stated would set the stage for a prompt, authoritative resolution of the issue by the federal appellate court." *Id.*

The obvious and express reason for Judge Sterling's holding of dismissal was to put the case in a procedural posture for a direct appeal to the Fifth Circuit on the single issue of exclusivity. If the Act is as clear and unequivocal as Appellant would have one believe, it is difficult to comprehend why Judge Sterling was so desirous of having his decision reviewed immediately by the Fifth Circuit.

The word "original" should never have been used in the 1953 Act. It is clear that the United States District Courts do not have *original* jurisdiction, much less *exclusive* original jurisdiction over all controversies arising

out of operations on the outer Continental Shelf. The Federal District Courts do not have exclusive jurisdiction of admiralty and maritime claims, 28 U.S.C. § 1333; they do not have exclusive jurisdiction of Jones Act Claims, 46 U.S.C. § 688; and they have no jurisdiction in some cases or no exclusive jurisdiction in other cases arising under various federal statutes which have been made applicable to the outer Continental Shelf such as the Longshoremen's and Harborworkers' Compensation Act, the National Labor Relations Act, OSHA, etc., 43 U.S.C. § 1333; 29 U.S.C. § 653.

The Longshoremen's and Harborworkers' Compensation Act vests primary jurisdiction of all claims arising under that Act in a Benefits Review Board, which appeal to the United States Court of Appeals. The Act grants only limited jurisdiction in the Federal District Court to enforce final awards. 33 U.S.C. § 921. The National Labor Relations Act places primary jurisdiction in an Administrator and only limited jurisdiction in the Federal District Court to enjoin violations of acts prohibited by § 215 of the act. 29 U.S.C. § 217, *et seq.* It should be noted that it is the Outer Continental Shelf Lands Act itself which extends the above statutes to the shelf. The Occupational Safety and Health Act gives no jurisdiction to the Federal District Courts. Judicial review of Occupational Safety and Health Review Commission rulings is vested in the United States Court of Appeals. The power to enforce orders of the Commission is also vested in the Court of Appeals. 29 U.S.C. § 660. All contract disputes arising out of public contracts concerning the shelf are handled by an administrative agency with judicial review vested in the United States Court of Claims.

41 U.S.C. § 609. The Disclosure of Welfare and Pension Plans Act provides that actions to recover penalties for violations of the provisions of the Act may be maintained "in any court of competent jurisdiction." 29 U.S.C. § 308. An employee's right to recover benefits due to him under the terms of an employee retirement income security program may be brought in "state courts of competent jurisdiction and district courts of the United States (which) shall have concurrent jurisdiction. . . ." 29 U.S.C. § 1132 (e)(1).

While the above is only a representative sampling of the various federal statutes pertaining to causes of action arising out of activities on the outer Continental Shelf, a review of the applicable statutes shows clearly that the Federal district courts do not have either original or exclusive jurisdiction of even a small fraction of such actions.

Federal courts lack the broad general original jurisdiction of state district courts. Federal courts have *no* common law jurisdiction or power except that which is granted by express statutory language. *Rice v. Minnesota and Northwest Railway Company,* 66 U.S. 358, 1 Black 358, 17 L.Ed. 147 (1861). Statutes conferring federal jurisdiction must be strictly construed. *See,* cases cited in historical digest note 2, pp. 107-08 of 28 U.S.C.A. 1331. The court's statement in *Gravois* that ". . . Had Congress intended to grant concurrent jurisdiction to the state courts it would have so specified . . . failure to do so shows their (sic) intention to retain jurisdiction in the United States Court," resulted from two misconceptions: (1) that the state did not already have jurisdiction; and (2) that the Federal courts did. The Federal courts had

no jurisdiction until it was extended to the outer Continental Shelf by the various Federal statutes. The congressional understanding of that fact is clearly shown by the sectional analysis of the Senate Bill, S. 1901 as reported:

> "Subsection (b) of Section 4 *extends* (emphasis added) original jurisdiction of the Federal district courts to cases and controversies arising out of operations on the outer Continental Shelf. . . ." S. Rep. No. 411, 83rd Cong., 1st Sess. (1953).

A finding by this court that the Federal District Courts have exclusive jurisdiction of common law actions would broaden the language of the Act by implication, and would abrogate the express language of the primary jurisdictional statute, 28 U.S.C. 1331. That statute provides that the Federal district courts shall have original jurisdiction of all civil actions where there is diversity of citizenship or a federal question and the matter in controversy exceeds the sum or value of $10,000. There are many common law actions wherein the matter in controversy is less than $10,000. In order to abrogate the terms of a similar statute, the statutory language must be explicit. The language of the Death On the High Seas Act, 46 U.S.C. § 761, the Jones Act, 46 U.S.C. 688 *et seq.*, and the jurisdictional statute 28 U.S.C. § 1333, all contain very specific language granting jurisdiction to the Federal district courts without regard to the amount in controversy. The Outer Continental Shelf Lands Act contains no such language. Congressional understanding of this point is shown by the language of Section 317 of Title III—Offshore Oil Pollution Fund, proposed proced-

ures to be followed in the event of an oilspill on the outer Continental Shelf:

> "The Federal district courts are to have original jurisdiction *regardless of the citizenship of the parties or the amount in controversy.*" [1971] U.S. Code Cong. & Ad. News 1584, 1597; P.L. 95-372. [Emphasis added.]

There can be no argument that state courts had general and concurrent jurisdiction with the federal courts over common law negligence actions. The grant of jurisdiction to the Federal District Courts which is contained in the Outer Continental Shelf Lands Act does not, of itself, imply that the jurisdiction is to be exclusive. *United States v. Bank of New York,* 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936).

> "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. *Robb v. Connolly,* 111 U.S. 637; 4 S.Ct. 544; 28 L.Ed. 542 (1884)." *Galveston, H. & S. A. R. Co. v. Wallace,* 223 U.S. 481, 490; 32 S.Ct. 205, 206; 56 L.Ed. 516.

Even if this Court supplies the elusive "exclusive", a literal construction of the mended statute could only be

interpreted as extending the exclusive jurisdiction of the Federal District Court to those cases and controversies which arose out of, or were in connection with operations conducted on the shelf involving exploration for or production of minerals, or out of lease rights. It would not extend the Federal district court's jurisdiction to all causes of action.

Every word of a statute is presumed to be used for a purpose. *Valley International Properties, Inc. v. Los Campeones, Inc.*, 568 S.W.2d 680 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The clear meaning and purpose of the exclusivity provisions contained in Chapter 85, 28 U.S.C. 1331, *et seq.* is to vest exclusive jurisdiction when and where Congress intended that consequence. The absence of such clear and unequivocal language in the Outer Continental Shelf Lands Act can only mean that Congress did not intend to deprive the State courts of their historic jurisdiction over common law actions.

The purpose of legislation is to guide and clarify, not to confuse and mislead. The interpretation of the Act suggested by Gulf Offshore would lead to an unjust result in the present case. We respectfully submit that this Court should not effect a significant change in statutory language which would cause such an unjust and unintended result.

APPENDIX B

2A Vernon's Texas Rules Annotated,
p. 403 (1976)

Rule 273. Special Charges

Either party may present to the judge and request such written instructions, special issues, definitions or explanatory instructions, as he desires to be given to the jury; and the judge may give them or a part thereof, or he may refuse to give them, as he may see proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any instructions, special issues, definitions or explanatory instructions shall be made separate and apart from such party's objections to the court's charge. As amended by order of October 12, 1949, effective March 1, 1950.

APPENDIX C

2A Vernon's Texas Rules Annotated,
p. 460 (1976)

Rule 276. Refusal or Modification

When an instruction, special issue, definition or explanatory instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon "Refused," and sign the same officially. If the trial judge modifies the same he shall indorse thereon "Modified as follows: (stating in what particular he has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, special issue, definition or explanatory instruction, when so indorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

APPENDIX D

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTIONS A, B AND C. FILED: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By. R. Trinkle, Deputy.

Requested Instruction No. A

In connection with the damage issues, you are instructed that any amounts allowed for:

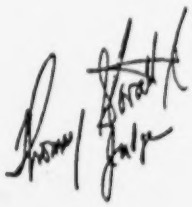
a) physical pain and mental anguish in the future, and

b) loss of earning capacity in the future, and

c) loss of physical capacity in the future, and

d) medical and hospital care in the future,

must be such amounts as are the present value thereof, and reduced to such present value by the use of an appropriate interest rate, prevailing at the time and place of trial, at which money can be safely and securely invested, and the balance shall be your answer.



REQUESTED INSTRUCTION NO. B

In considering the issues submitted by the Court dealing with the question of amount of damages sustained by Stephen Gaedecke, if any, you are instructed that you are not to consider or speculate concerning future inflationary trends or possible future increases in earnings due to increases in productivity, that is you shall not speculate in projection of future damages, if any, about possible future inflationary trends or possible depressions or about possible future wage increases.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.

Supreme Court, U. S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLERK

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

REPLY BRIEF OF PETITIONER GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

CHARLES D. KENNEDY
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

Attorney for Petitioner
Gulf Offshore Company,
A Division of the Pool Company

Of Counsel:

BRADLEY A. JACKSON
ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	I
ARGUMENT IN REPLY	1
INTRODUCTION	1
I. Exclusivity Of Federal Court Jurisdiction—The Texas/Louisiana, Texas/Federal District Court Conflict Necessitates Review On Writ Of Certiorari	2
II. The Liepelt Instruction—Properly Submitted, Preserved and Applicable	4
a. Properly Submitted	5
b. Properly Preserved	6
c. Liepelt Applicable	7
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

	Page
Bourg v. Texaco Oil Company, Inc., 578 F.2d 1117, 1120 (5th Cir. 1978)	7
Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301)	4
Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87 (Tex. 1973)	5
Mejia v. Liberty Mutual Ins. Co., 544 S.W.2d 690 (Tex. Civ. App.—Houston (14th Dist.) 1976)	5
Norfolk & Western Railway Company v. Liepelt, 48 U.S. L.W. 4132 (Feb. 19, 1980)	2, 6, 7
Pool v. Kemper Insurance Group, 386 So.2d 1006 (La. App. 1980)	1, 3

TEXAS RULES OF CIVIL PROCEDURE

Rule 273	6

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

REPLY BRIEF OF PETITIONER GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

ARGUMENT IN REPLY

INTRODUCTION

Petitioner offers this Reply Brief to supplement its Petition by bringing to the Court's attention a newly reported decision of another Louisiana appellate court finding in favor of the exclusivity of federal court jurisdiction in Outer Continental Shelf Lands Act cases, i.e., *Pool v. Kemper Insurance Group*, 386 So.2d 1006 (La. App. 1980). This latest decision reinforces the conflict between

Texas and Louisiana appellate courts on this important jurisdictional issue involving a federal statute.

Petitioner also takes this occasion to point out that Respondents' arguments on the jurisdiction issue actually emphasize the necessity of this Court granting the writ so that careful consideration can be afforded this significant jurisdictional dispute and meaningful guidance can be given to the federal and state trial courts. Avoiding or delaying consideration of the question by denying the writ would only perpetuate the forum shopping and removal problems presently caused by the split in authority between the Texas courts on the one hand and the Louisiana state and Louisiana/Texas federal district courts on the other hand.

Finally, Petitioner will show that Respondents' efforts to avoid the application of *Norfolk & Western Railway Company v. Liepelt*, 48 U.S.L.W. 4132 (Feb. 19, 1980), to this case are without merit.

I.

EXCLUSIVITY OF FEDERAL COURT JURISDICTION—THE TEXAS/LOUISIANA, TEXAS/FEDERAL DISTRICT COURT CONFLICT NECESSITATES REVIEW ON WRIT OF CERTIORARI

The Petition demonstrates several special and important reasons for review on writ of certiorari, beginning with the importance of this question affecting the jurisdiction of the federal courts and emphasizing the conflict regarding that question between the Texas Court of Civil Appeals in this case and both the Louisiana appellate courts and Texas/Louisiana federal district courts in all other reported decisions.

The latest reported decision on the question of exclusivity of federal court jurisdiction over Lands Act cases, *Pool v. Kemper Insurance Group,* 386 So.2d 1006 (La. App. 1980), adds to the list of holdings in favor of exclusivity and reinforces the conflict between the courts of Texas and Louisiana regarding this significant federal question.

In *Pool,* a case involving a claim for personal injuries sustained in an offshore oil rig accident, the state trial court entered a judgment dismissing the case for want of subject matter jurisdiction. On appeal by the plaintiff, the Louisiana Circuit Court of Appeals affirmed, holding, *inter alia,* that the purpose of the Lands Act was to vest all civil and political jurisdiction in matters involving offshore drilling activities on the Outer Continental Shelf exclusively in the federal courts.

Subject matter jurisdiction is of fundamental importance in all litigation. The question of whether federal court jurisdiction is *exclusive* in Lands Act cases is vital to every lawsuit arising out of activity in the Lands Act area. How can practitioners and judges have any confidence in the jurisdictional validity of such cases filed in state court unless the present conflict between Texas state courts, Louisiana state courts and federal district courts in both states is definitively resolved?

Although Respondents treat the jurisdiction question as if Petitioner's position is an absurdity, *all* of the decisional law except the opinion of the court below favors the exclusivity of federal court jurisdiction as the more well-reasoned interpretation of the Lands Act statutory language, taken as a whole. If Respondents' arguments are so unequivocally and undeniably correct, how, then, does

one explain the fact that every court which has considered the issue except the court below has held against Respondents' position? Respondents' arguments to the effect that the federal district court decisions "are hardly persuasive" and that the Court of Civil Appeals in this case was correct in its decision to "follow the dissent" in *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301), simply highlight the importance of having this jurisdictional conflict resolved by this Court.

Given the clear split of authority on this important jurisdictional question, how would the jurisprudence in this expanding field of litigation be served by avoiding or delaying a definitive answer? Denial of the writ would leave the law on this point confused and in conflict.

The question of whether state courts have subject matter jurisdiction to hear causes of action pursuant to the Lands Act is of obvious importance and is ripe for decision. The writ of certiorari petitioned for should be granted.

II.

THE LIEPELT INSTRUCTION— PROPERLY SUBMITTED, PRESERVED AND APPLICABLE

Respondents contend that Petitioner's requested jury instruction that any award of damages would not be subject to federal income taxation was not properly submitted, was not properly preserved as error, and, in any event, was not applicable in this case. Petitioner will show that these allegations are entirely without merit. The requested instruction was based on reasonable inferences that might be drawn from the evidence, which is the

appropriate legal standard in Texas. The error in refusing the instruction was properly preserved, as most eloquently demonstrated by the Court of Civil Appeals' discussion of the point on the merits in its opinion. Finally, federal law concerning such an instruction is clearly applicable as the Lands Act mandates use of federal law with resort to state law concepts only where a gap exists in the controlling federal law.

a. Properly Submitted

Under Texas procedure, a jury instruction is proper "if it finds support in any evidence of probative value or the reasonable inferences that may be drawn therefrom, and if it might be of some aid or assistance to the jury in answering the issues submitted." *Mejia v. Liberty Mutual Ins. Co.*, 544 S.W.2d 690 (Tex. Civ. App.—Houston (14th Dist.) 1976). Under Texas law, it is the duty of the trial court to give the jury, in its charge, the rule to be applied in ascertaining the damages. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex. 1973). The record clearly reflects probative evidence on the issue of damages and it cannot, in good faith, be denied that a reasonable inference that might be drawn from such evidence is that the damage award would be subject to federal income taxation. "Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party." *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). The requested instruction set forth the appropriate legal standard and clearly would have assisted the jury in determining the appropriate compensation for the plaintiff.

Contrary to Respondents' assertion, there is absolutely no *caveat* in the *Liepelt* opinion that the jury instruction must be predicated on evidence in the record regarding federal income taxes. The two questions addressed in *Liepelt*, the admissibility of evidence and the appropriateness of a jury instruction, are separate and distinct from one another. The *Liepelt* holding regarding the appropriateness of such a jury instruction is grounded on policy considerations, including what an average juror is likely to assume regarding taxation of a damage award. The Court's holding in *Liepelt* is clearly predicated on the tax consciousness of the average juror and *not* on the evidence that such juror may have heard during the course of a particular trial.

Submission of the instruction was proper under Texas law and Petitioner's requested instruction complied with the applicable rule of procedure regarding such instructions. Rule 273, Texas Rules of Civil Procedure (Respondent Mobil's Brief—Appendix B).

b. Properly Preserved

Respondents say that the failure to give Petitioner's requested *Liepelt* instruction was not preserved as error because the trial judge did not write the word "refused" on the requested instructions at the time of refusing them and signed his name only to the top instruction of a set of three instructions which he was refusing. Petitioner's requested instruction was clearly refused as it does not appear as part of the court's charge to the jury, but is undisputably part of the official court records. The three instructions Petitioner requested were stapled together in sequential order and the judge simply signed the top one to signify his refusal to submit them.

Respondents' "waiver" argument is entirely spurious, as most clearly evidenced by the fact that the Court of Civil Appeals found no waiver with respect to the point. The Court of Civil Appeals opinion addressed the question on the merits and the court obviously would not have done so had the point been waived as contended by Respondents. (Court of Civil Appeals Opinion—Petition Appendix—A-16 to A-17.)

c. Liepelt Applicable

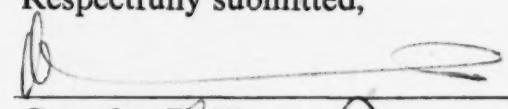
Respondent Mobil's position is that *Liepelt* is inapplicable on the basis of the implicit assumption that national uniformity was rejected by Congress in the Lands Act. The argument fails because the assumption is incorrect. The Lands Act clearly provides for federal law to be applicable and state law to be used only to fill gaps in the federal law. Obviously, there is no gap in the federal law on the question of the appropriateness of a *Liepelt* jury instruction. The policy considerations relied upon in *Liepelt* clearly apply in Lands Act cases, as well as in FELA cases.

Respondent Gaedecke, disagreeing with Respondent Mobil, says that this is not a federally created statutory cause of action, but instead a common law negligence case. Consequently, the thrust of this Respondent's argument entails the desirability of "adopting" federal law as expressed by *Liepelt*. As indicated above, this approach is backwards. Federal law applies in the first instance and state law is to be utilized only where there is no federal law on the point. Respondent Gaedecke is clearly incorrect in asserting that his cause of action was not derived from the Lands Act. *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978).

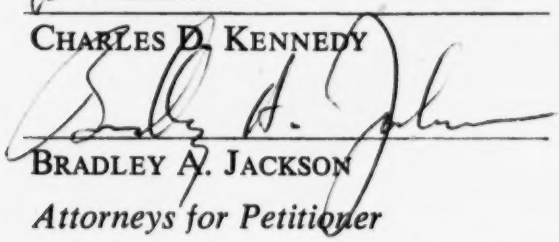
CONCLUSION

For the foregoing reasons, Petitioner renews its prayer that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,



CHARLES D. KENNEDY



BRADLEY A. JACKSON

Attorneys for Petitioner

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

This is to certify that three copies of this Reply Brief have been served on all parties required to be served, *i.e.*, on Respondent by placing same in an envelope and depositing it in the United States mail with first-class postage prepaid, addressed to counsel of record as follows, Frank Caton, Esq., Crain, Caton, James and Womble, 3300 Two Houston Center, Houston, Texas 77010, and on the Plaintiff in the Trial Court by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record as follows, Joseph D. Jamail, Esq., Jamail & Kolius, 3300 One Allen Center, Houston, Texas 77002, this 25th day of November, 1980.

CHARLES D. KENNEDY

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

SUPPLEMENTAL BRIEF OF RESPONDENT STEVEN GAEDECKE

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of record for Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTRODUCTION	1
I. POOL V. KEMPER INSURANCE GROUP CONSTRUES THE WRONG STATUTE	2
II. NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980)	5
A. Procedure	5
B. Which first—the chicken or the egg?	5
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

	Page
Bourg v. Texaco Oil Company, Inc., 578 F.2d 1117, 1120 (5th Cir. 1978)	6
Bradley v. School Board of City of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)	4
Custom Leasing, Inc. v. Texas Bank & T. Co. of Dallas, 516 S.W.2d 138, 142 (Tex. 1974)	5
Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 E.D. La. 1972)	3
Freidrich v. Whittaker Corp., 467 F.Supp. 1012 (S.D. Tex. 1979)	3
Gravois v. Travelers Indemnity Co., 173 So.2d 550 (La. App., writ ref'd 175 So.2d 301)	2, 3
Gulf Offshore Co. v. Mobil Oil Corp., 594 S.W.2d 497, decided December 12, 1979, motion for rehearing denied January 9, 1980	2
Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977, cert. den. 444 U.S. 979)	6
Pool v. Kemper Insurance Group, 386 So.2d 1006 (La. App., May 21, 1980)	1, 2
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950)	3

UNITED STATES STATUTES

43 U.S.C. § 1333(b)	3, 4
43 U.S.C. § 1349(b)(1)	4

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

SUPPLEMENTAL BRIEF OF RESPONDENT STEVEN GAEDECKE

INTRODUCTION

Too little—too late

Petitioner ("Gulf") has filed a Reply Brief in which it brings to the attention of the Court a "newly" [sic] reported decision of a "Louisiana appellate court finding in favor of the exclusivity of federal court jurisdiction in Outer Continental Shelf Lands Act cases." This is *Pool v.*

Kemper Insurance Group, 386 So.2d 1006 (La. App., May 21, 1980).

Gulf filed its petition for certiorari in this case on October 14, 1980, and while *Pool* does not bolster Gulf's jurisdictional contentions it does raise the question as to why it was not presented in the petition for certiorari.[1]

Thus, we believe it would be helpful to (1) succinctly point out the inapplicability of *Pool* to the case at bar, (2) briefly correct Gulf's misconception of its failure to follow Texas practice (which now touches on this Court's jurisdiction), and (3) set at rest Gulf's misconceived idea that the Lands Act (OCSLA) created respondent Gaedecke's remedy. The filing of this brief will not cause harm, prejudice or delay.

I.

POOL V. KEMPER INSURANCE GROUP CONSTRUES THE WRONG STATUTE

Pool blindly follows *Gravois v. Travelers Indemnity Co.*, 173 So.2d 550 (La. App., writ ref'd 175 So.2d 301) and appears to have been considered in the same "offhand manner"[2] as *Gravois* (173 So.2d 553) because the court

---

1. This Court's rules seem to contemplate that while a petition for certiorari is pending supplements thereto are intended to cover "new cases * * * not available at the party's last filing." S.Ct. R. 22.6.

2. As an indication of its perfunctoriness, we note that the *Pool* court said in its May 21, 1980 opinion that the only cases it found specifically dealing with whether state courts have concurrent jurisdiction with federal courts over actions arising out of incidents on fixed rigs located on the Outer Continental Shelf were *Gravois* and *Freidrich.* (386 So.2d 1011). It ignored the decision of the court of civil appeals in this case—*Gulf Offshore Co. v. Mobil Oil Corp.*, 594 S.W.2d 497, decided *December 12, 1979,* motion for rehearing denied *January 9, 1980.*

fell into the same constitutional error. It adopted *Gravois'* erroneous holding that had Congress intended to grant concurrent jurisdiction it would have said so in OCSLA, and its failure to do so shows "their intention to retain [sic] jurisdiction in the United States Courts" (386 So.2d at 1010). This is error as pointed out in our Brief in Opposition, p. 10.

But *Pool* went even further and gave a "*broad interpretation*" to the OCSLA jurisdictional grant. This, too, is error and counter to *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), holding that congressional grants of jurisdiction are strictly construed.

Interestingly enough the *Pool* court finds *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), relied on by Gulf (Pet. for Cert. pp. 13, 14), not to be in point on the jurisdictional question. Judge Sterling in *Freidrich v. Whittaker Corp.*, 467 F.Supp. 1012 (S.D. Tex. 1979), another case relied on by *Gulf* (Pet. for Cert. p. 14), had trepidation about *Fluor* (467 F. Supp. at 1015).

But most importantly, *Pool* was decided under the original 1953 Lands Act, 43 U.S.C. § 1333(b). 386 So.2d at 1010. So were all the other cases relied on by Gulf (Pet. for Cert. pp. 8, 9): *Gravois,* 173 So.2d at 553; *Fluor,* 341 F.Supp. at 759, 760; *Borne,* 1973 A.M.C. at 389; and *Friedrich,* 467 F.Supp. at 1013. The 1978 Amendments to the Lands Act were not in issue in any of these cases.

This answers petitioner's question:

> If Respondents' arguments are so unequivocably and undeniably correct, how, then, does one explain

> the fact that every court which has considered the issue except the court below has held against Respondents' position? (Reply Brief pp. 3, 4).

The answer is that all of the decisions of these courts rest on the original 1953 Lands Act, not the pertinent 1978 Amendments thereto, as did the court below in this case. 594 S.W.2d 497, 502. "Jurisdiction," "exclusive jurisdiction": actually that is the only jurisdictional contention of Petitioner in this case.

As stated in our Brief in Opposition (pp. 12, 13) the jurisdictional section of the original 1953 Lands Act, 43 U.S.C. § 1333(b), "original jurisdiction," had become controversial and the 1978 amendment, 43 U.S.C. § 1349 (b)(1), "jurisdiction," signaled clear changes in the law. This is borne out by the Congressional findings in Section 101(8) of the 1978 Amendments (92 Stat. 630):

> [T]here presently exists a variety of technological, economic, environmental, administrative and *legal problems* which tend to retard the development of the oil and gas natural reserves of the Outer Continental Shelf. (Emphasis ours).

The Texas Court of Civil Appeals and the Texas Supreme Court were required to apply the jurisdictional section of the 1978 Amendments, 43 U.S.C. § 1349 (b)(1); not 43 U.S.C. § 1333(b) contained in the original 1953 Lands Act (Brief in Opposition pp. 11-13). An appellate court reviews the law as it presently is, not as it once was. *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

II.

NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980)

A. Procedure

Liepelt was decided February 19, 1980 after Gulf's application for a writ of error was under submission in the Texas Supreme Court, and was brought to that court's attention by Gulf. Gaedecke then raised the procedural point that Gulf, by failing to comply with Texas procedure in requesting an instruction on federal income taxes, had waived the point. That point is now asserted in this Court as a jurisdictional ground for denying the writ (Brief in Opposition, pp. 2-3).

Gulf's only serious contention is that as the court of civil appeals discussed the point in its opinion it was not waived (Reply brief p. 5). To this it suffices to say that in Texas, "It is the duty of the appellate court to sustain the judgment of the *trial court* if it is correct on any theory of law applicable to the case." (Emphasis ours). *Custom Leasing, Inc. v. Texas Bank & T. Co. of Dallas,* 516 S.W.2d 138, 142 (Tex. 1974). The Texas Supreme Court did this in denying Gulf's application for a writ of error.

B. Which first—the chicken or the egg?

Gulf says OCSLA applies federal law first and state law only absent federal law. It then assumes, with no proof whatever, that Louisiana law does not require a jury instruction on federal income taxes and it is necessary to have recourse to *Leipelt,* which is federal common

law. In this circumgyration it still insists that Gaedecke's cause of action is derived from the Lands Act, citing *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978).

We read *Bourg* to the contrary, for it says that a plaintiff worker on the Shelf is allowed "any type of negligence * * * *which would be cognizable under state law*" (578 F.2d 1120, emphasis ours).

And no one can read the exhaustive and learned opinion of Judge Fay in *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977, cert. den. 444 U.S. 979) without being convinced that the Lands Act, federal law, required Gaedecke "to look to state law for redress" and that "this controversy should be controlled by state law." (561 F.2d at 1190). This because no civil remedy other than common law negligence may be implied in this case:

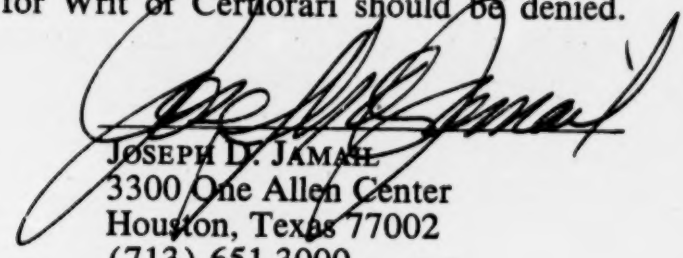
(1) "[A] cause of action should not be created unless the primary purpose of the Act (or at least one of the primary purposes) is to benefit or protect the workers on offshore oil platforms." (561 F.2d 1187). The legislative history of the Lands Act shows that if this was the case it was "at best secondary concern." (561 F.2d 1188).

(2) State law should govern this controversy, "not solely because there are 'gaps in the Federal Code,' " but because Congress recognized "that the individual states had a very real interest in the workers on these platforms." (561 F.2d 1189).

It is respectfully submitted that there is no basis for injecting the imponderables of federal common law in the Lands Act.

CONCLUSION

The Petition for Writ of Certiorari should be denied.



JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Counsel of record for
Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three copies of the foregoing Supplemental Brief of Respondent Steven Gaedecke were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Bradley A. Jackson, Esq.
Royston, Rayzor, Vickery & Williams
3710 One Shell Plaza
Houston, Texas 77002;

Frank Caton, Esq.
Crain, Caton, James & Womble
Two Houston Center
Houston, Texas 77002;

(3) Service on each of such parties was made on December 9, 1980, by depositing said copies of this Supplemental Brief in a United States Post Office, first class postage prepaid, and addressed to the above-named counsel.

JOSEPH D. JAMAIL

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

BRIEF FOR PETITIONER

CHARLES D. KENNEDY
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380
Attorney for Petitioner
Gulf Offshore Company,
A Division of the Pool Company

Of Counsel:

BRADLEY A. JACKSON
ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1.

Whether the courts of the State of Texas have subject matter jurisdiction to hear causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979)?

2.

Whether the rule of law regarding instructions to the jury that any award of damages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt,* 444 U.S. 490 (1980), is applicable and controlling in an action arising under the Outer Continental Shelf Lands Act?

LIST OF PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceeding in the court whose judgment is to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this case:

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L.A. Levy, Inc.
   Offshore Crews, Inc.
   Unknown underwriters at interest with the Levy entities, which assumed Respondent's defense.
2. Steven Gaedecke, Plaintiff.
3. Jamail, Kolius & Mithoff, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.[1]

---

1. In accordance with the amendment of Rule 34.1(b) to refer to amended Rule 28.1, Petitioner takes this opportunity to advise that:
   1) Gulf Offshore Company, A Division of the Pool Company no longer exists as a seperate entity, having been totally absorbed by Pool Company.
   2) The parent company of Pool Company is ENSERCH Corporation.
   3) The non-wholly owned subsidiaries of Pool Company are Pool Arabia, Ltd. and Pool Santana, Limited.
   4) Affiliates of Pool Company are the following members of the ENSERCH Corporation group, many of which themselves have subsidiaries: ENSERCH Finance N.V., Ebasco Services Incorporated, Enserch Domestic International Sales Corporation, Intairdril (Aust.) Pty. Ltd., Irano-Intairdril S.S.K., Lone Star Gas Company of Texas, Inc., LSG Intragas, Inc., Lone Star Gathering Company, Solus Ocean Systems, Inc., Solus Ocean Systems La. Inc., Samson Ocean Systems, Inc., Associated Oiltools, Inc., Enserch Canadian Exploration, Inc., LS Engery, and Enserch Exploration, Inc.

6. Underwriters subscribing Policy No. J.F.X. 0007, issued to ENSERCH Corp. and Pool Offshore Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
TABLE OF AUTHORITIES	V
OPINION AND JUDGMENTS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT ON THE MERITS	10
I. THE OUTER CONTINENTAL SHELF LANDS ACT VESTS SUBJECT MATTER JURISDICTION OVER CASES ARISING UNDER THE ACT EXCLUSIVELY IN THE FEDERAL COURTS	11
A. The Lands Act extension of federal, but not state, political jurisdiction to the shelf area made a specific grant of exclusive federal court jurisdiction unnecessary	13
B. The statutory language of the Lands Act leaves no doubt that federal court jurisdiction is exclusive	21
C. The legislative history of the Lands Act conclusively demonstrates the understanding and intent of Congress that federal court jurisdiction over Lands Act cases would be exclusive	25
D. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) recognized, sub silentio, the exclusivity of federal court jurisdiction over Lands Act cases	27
E. The 1978 amendments to the Lands Act did not alter the exclusivity of federal court jurisdiction	28
II. THIS COURT'S DECISION IN LIEPELT IS APPLICABLE AND CONTROLLING IN THIS LANDS ACT CASE	30
A. The holding in Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980)	31

Page

B. Procedural considerations—Petitioner's Requested instruction was properly submitted and the Error of its Rejection was properly preserved 32

1. Properly Submitted 33

2. Properly Preserved 34

C. Liepelt is applicable and controlling in this Lands Act case 35

CONCLUSION 41

CERTIFICATE OF SERVICE 42

TABLE OF AUTHORITIES

CASES

Page

Aymond v. Texaco, Inc., 554 F.2d 206 (5th Cir. 1977) 37, 38

Barnes v. Bituminous Casualty Corp., 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref. n.r.e.) 30

Borne v. Tenneco Oil Company, 1973 A.M.C. 388 (E.D. La. 1972) 11

Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) 25

Bourg v. Texaco Oil Company, Inc., 578 F.2d 1117 (5th Cir. 1978) 37, 38

Cazad v. Chesapeake & Ohio Ry., 622 F.2d 72 (4th Cir. 1980) 40

City of Beaumont v. West, 484 S.W.2d 789 (Tex. Civ. App.—Beaumont 1972, writ ref. n.r.e.) 30

Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 (E.D. La. 1972) 11

Friedrich v. Whittaker Corporation, 467 F.Supp. 1012 (S.D. Tex. 1979) 11

Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301) 11

In Re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974), *cert. denied* 423 U.S. 886 (1975) 39

Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87 (Tex. 1973) 33

Lang v. Texas & P. Ry. Co., 624 F.2d 1275 (5th Cir. 1980) 40

Louviere v. Shell Oil Company, 509 F.2d 278, opinion denying rehearing, 515 F.2d 571 (5th Cir. 1975) 39

CASES

	Page
Mejia v. Liberty Mutual Ins. Co., 544 S.W.2d 690 (Tex. Civ. App.—Houston [14th Dist.] 1976)	33
Nations v. Morris, 483 F.2d 577 (5th Cir. 1973)	37
Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980)	9, 10, 11, 31, 33, 34, 35, 36, 40
Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977)	37
Pool v. Kemper Insurance Group, 386 So.2d 1006 (La. App. 1980)	11
Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969)	8, 9, 17, 20, 27, 28, 35, 37, 38, 39
Southwestern Bell Tel. Co. v. City of Kountze, 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976)	30
United States v. California, 332 U.S. 19 (1947)	16
United States v. Dickerson, 310 U.S. 554, 561-562 (1940)	25

UNITED STATES STATUTES

28 U.S.C. § 1257(3)	2
33 U.S.C. § 901, *et seq*	37
33 U.S.C. § 933	37
43 U.S.C. § 1331, *et seq.*	2, 4, 7
43 U.S.C. § 1332	25
43 U.S.C. § 1333	2, 8, 22
43 U.S.C. § 1333(a)(1)	8, 23
43 U.S.C. § 1333(a)(2)	8, 23
43 U.S.C. § 1333(a)(3)	8, 24
43 U.S.C. § 1333(b)	7, 13, 15, 16, 22, 23, 29, 37
43 U.S.C. § 1333(b)(1)	28, 29
46 U.S.C. § 761	39

TEXAS RULES OF CIVIL PROCEDURE

Rule 273	34

MISCELLANEOUS

Senate Bill 1901	13
S. Rep. No. 411, 83d Cong. 1st Sess. 6 (1953)	14, 27
S. Rep. No. 441, 83d Cong., 1st Sess. 41 (1953)	15
S. Conf. Rep. No. 95-1091, 95th Cong., 2d Sess. 114 (1978)	29
99 Cong. Rec. 7228-7232 (1953)	18
99 Cong. Rec. 7230 (1953)	17
99 Cong. Rec. 7231-7232 (1953)	18
99 Cong. Rec. 7233 (1953)	19
99 Cong. Rec. 7234 (1953)	19
99 Cong. Rec. 7235 (1953)	19
99 Cong. Rec. 7257 (1953)	21

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

BRIEF FOR PETITIONER

OPINION AND JUDGMENTS BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 594 S.W.2d 496 and is printed in the Joint Appendix, beginning at page 19. The judgment entered by the Court of Civil Appeals is printed in the Joint Appendix at page

37. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in the Joint Appendix at page 40. The judgment entered by the 129th Judicial District Court of Harris County, Texas is printed in the Joint Appendix beginning at page 13.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on December 12, 1979. A timely Motion for Rehearing was filed on December 27, 1979, and overruled on January 9, 1980. Application to the Supreme Court of Texas for a Writ of Error, filed February 8, 1980 was refused without opinion with the notation "no reversible error" on June 18, 1980. A timely Motion for Rehearing, filed July 3, 1980, was overruled on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). [The opinion of the Court of Civil Appeals deals in pertinent part with federally created rights under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979).] This Court granted certiorari on December 8, 1980.

STATUTE INVOLVED

Section 1333 of Title 43 of the United States Code, as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the outer Continental Shelf and all artifiicial islands and fixed structures erected thereon.

Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose.

Subsection (a) provided that:

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State; *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf,

and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. *All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.* State taxation laws shall not apply to the outer Continental Shelf. (Emphasis supplied).

(3) The provisions of this section for adoption of State law as the law of the United States shall *never* be interpreted as a basis for claiming any interest in *or jurisdiction* on behalf of any State *for any purpose* over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (Emphasis supplied).

STATEMENT OF THE CASE

This is an oil company (Respondent Mobil)/drilling contractor (Petitioner Gulf Offshore) contractural indemnity case arising in the area governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979). Respondent Mobil's action for contractural indemnity against Petitioner was brought as a third party action in a suit by a personal injury plaintiff, Gaedecke, against Respondent Mobil, which action also arose in the area governed by the Lands Act.

On July 9, 1974, Petitioner and Respondent Mobil entered into Contract No. 1159, which concerned oil well completion operations to be performed by Petitioner on Respondent Mobil's platform wells situated in Grand Isle Block 95 offshore of the State of Louisiana on the outer Continental Shelf.

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula into the Gulf of Mexico and regained

strength, necessitating evacuation of offshore oil platforms in the Gulf, including the platform upon which Petitioner was performing its completion work for Respondent Mobil.

Personal injury plaintiff Gaedecke was injured on September 22, 1975, following his evacuation from the platform to a work boat.

Plaintiff Gaedecke sued Respondent Mobil and three additional companies associated with the work boat, L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. for personal injuries sustained as a result of the accident. Respondent Mobil filed a Third Party Complaint against Petitioner, alleging liability for indemnity on both tort and contract theories.

Prior to trial, Plaintiff Gaedecke entered into a novel "settlement" agreement with Respondent Mobil and the Levy defendants, which had assumed Respondent Mobil's defense. Plaintiff proceeded solely against Respondent Mobil which, in turn, sought only *contractual* indemnity from Petitioner.

Trial was to a jury, which found that Respondent Mobil, by its negligence as offshore platform owner, proximately caused the injuries to Plaintiff. Damages of $900,000.00 were found. The jury also found that Plaintiff's injuries were incident to or resulted directly or indirectly from the work of Petitioner under its contract with Respondent Mobil. Judgment for $900,000.00 was rendered in favor of Plaintiff against Respondent Mobil, out of which the Intervenor was awarded recovery of the sum of $32,712.09, its workers' compensation lien. Judgment for contractual indemnity in the amount of $900,000.00 was rendered against Petitioner.

Petitioner first raised the federal question pertaining to subject matter jurisdiction to be reviewed herein by its First Amended Answer to Respondent's Third Party Complaint. (J.A. 5).[2] Petitioner objected to the court's lack of subject matter jurisdiction in such answer and again raised the point by Motion for Summary Judgment prior to trial. (R. 123-125). The point was renewed in Petitioner's Motion for Instructed Verdict (R. 205-211), in Petitioner's Motion for Judgment Non Obstante Veredicto (R. 213-216), in Petitioner's Amended Motion for New Trial (R. 276-282) and as Petitioner's first point on appeal to the Court of Civil Appeals and to the Supreme Court of Texas.

The special exception to the lack of subject matter jurisdiction contained in the answer, Motion for Summary Judgment, Motion for Instructed Verdict, Motion for Judgment Non Obstante Veredicto and Amended Motion for New Trial were all overruled by the trial court. The Court of Civil Appeals affirmed the trial court's judgment, holding that the courts of the State of Texas have subject matter jurisdiction. The Supreme Court of Texas denied Petitioner's Application for Writ of Error.

Petitioner raised the federal question regarding appropriate instruction to the jury on the issue of taxation of any damage award by requesting that an instruction be given to the jury on the issue. Instruction C was requested in a timely and appropriate fashion prior to finalization of the jury charge but was refused by the trial court. (J.A. 11-12). Denial of the requested instruction was set forth as a reason for granting a new trial in Petitioner's

2. "J.A." refers to the Joint Appendix; "R." refers to the clerk's Transcript in the Court of Civil Appeals in which the pages are consecutively numbered.

Amended Motion for New Trial (R. 281), but such motion was overruled. The point was preserved in the appeal to the Court of Civil Appeals as Point of Error 13. The Court of Civil Appeals affirmed the trial court on the point. The issue was carried forward as the Twelfth Point of Error in Petitioner's Application for Writ of Error to the Supreme Court of Texas, but the Application was denied.

SUMMARY OF ARGUMENT

I. In considering and enacting into law the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979), Congress recognized that it was not dealing with an area of concurrent federal and state political jurisdiction. With respect to the outer Continental Shelf, there was no historical federal or state political jurisdiction and the question was to what extent federal political jurisdiction could be *extended* into the area. The legislative history of the Lands Act establishes that Congress made a conscious decision to extend only *federal* political jurisdiction to the outer Continental Shelf. The Senate, whose bill became the Lands Act, specifically rejected amendments which would have concurrently extended state political jurisdiction to the outer Continental Shelf area. Given this context, it can be seen that it was not necessary for Congress to specifically provide that federal court jurisdiction would be exclusive because without concurrent state political jurisdiction in the area, state police power, including state court jurisdiction to adjudicate, could not exist.

The language of the Lands Act, read in the context of its enactment, leaves no doubt that jurisdiction of the federal courts was to be exclusive. 43 U.S.C. § 1333(b),

the legislative grant of jurisdiction to the federal courts, contained no concurrent extension of judicial power to state courts. Subsection (a)(1) of 43 U.S.C. § 1333 extends only *federal* political jurisdiction to the outer Continental Shelf area. 43 U.S.C. § 1333(a)(2) provides for administration and enforcement of the applicable laws by the appropriate officers and courts of the United States, without any mention of enforcement by state courts. Finally, subsection (a)(3) of Section 1333 contains a specific denial of any state assertion of jurisdiction for any purpose.

The legislative history of the Lands Act is a useful tool in resolving the issue whether federal court jurisdiction over Lands Act cases is exclusive and conclusively demonstrates the understanding and intent of Congress that federal court jurisdiction would be exclusive.

This Court's discussion of the history of the passage of the Lands Act in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), evidences this Court's appreciation that the conflicting forces at work with respect to passage of the Lands Act resulted in state law becoming federal law *federally* enforced.

The 1978 amendments to the Lands Act did not alter the exclusivity of federal court jurisdiction because the amendments did not set forth a grant of concurrent state political jurisdiction or jurisdiction to adjudicate, changing the existing law. The unexplained deletion of the word "original" from the section pertaining to federal district court jurisdiction is insignificant, particularly in view of the legislative history which indicates that the renumbered jurisdictional provision simply reincorporates the 1953 law.

II. The trial court's refusal to instruct the jury that its award of damages, if any, would not be subject to federal income taxation is reversible error in light of this Court's decision in *Norfolk & Western Railway Company v. Liepelt,* 444 U.S. 490 (1980). In *Liepelt,* this Court held that it was reversible error for a trial court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested that the trial court give the jury virtually the same instruction, which was refused.

Petitioner's requested jury instruction was properly tendered and the error of the trial court's rejection of it was properly preserved. The requested instruction was based on reasonable inferences that might be drawn from the evidence, which is the appropriate legal standard in Texas. The error in refusing the instruction was properly preserved, as most eloquently demonstrated by the Court of Civil Appeals' discussion of the point on the merits in its opinion.

Although *Liepelt* addressed the jury instruction issue in the context of a wrongful death action brought under the FELA, the holding is clearly applicable in this case arising under the Lands Act. The Court of Civil Appeals recognized the applicability of the Lands Act to all aspects of this case. This Court's opinion in *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), makes it clear that under the Lands Act the applicable law is federal law with the law of the state adjacent to the fixed platform in question to be utilized only to fill "gaps" in the controlling federal law. In *Liepelt,* this

Court reaffirmed the established principle that questions concerning the measure of damages in federal actions are federal in character and governed by federal law. Consequently, the law of the adjacent state in this case, Louisiana, and, additionally, the law of the forum state, Texas, with respect to the requested jury instruction was irrelevant and, upon Petitioner's request, the trial court should have given the *Liepelt* type instruction. There is no gap in the federal law on the question of the appropriateness of a *Liepelt* jury instruction. The policy considerations relied upon in *Liepelt* clearly apply in Lands Act cases.

Respondent Gaedecke's personal injury case was, of necessity, predicated on rights created and controlled by the Lands Act so that the assertion of common law negligence in an effort to make the *Liepelt* decision inapplicable is incorrect.

The *Liepelt* rule of law is controlling in this matter even though the decision was handed down after the trial court's refusal of the requested instruction. The federal Circuit Courts of Appeals have uniformly applied *Liepelt* retroactively.

ARGUMENT ON THE MERITS

Two questions are presented for decision in this case. The first is the basic, fundamental question whether the courts which tried and reviewed the case on appeal, the courts of the State of Texas, had subject matter jurisdiction. The second involves the applicability and effect, in the context of this Outer Continental Shelf Lands Act (hereafter "Lands Act") litigation, of the rule of law regarding instruction to the jury that any award of dam-

ages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980). Petitioner's position with respect to these questions is set forth below.

I.

THE OUTER CONTINENTAL SHELF LANDS ACT VESTS SUBJECT MATTER JURISDICTION OVER CASES ARISING UNDER THE ACT EXCLUSIVELY IN THE FEDERAL COURTS

At virtually every stage of the proceedings in the trial court, including pre-trial, trial and post-trial, Petitioner objected to the state court's assertion of subject matter jurisdiction in regard to both plaintiff's personal injury action against Respondent Mobil and its contractual indemnity action against Petitioner on the ground that both actions arose under the Lands Act and, as such, had to be brought in federal district court. This fundamental error was emphasized on appeal, but the Court of Civil Appeals, and, implicitly, the Supreme Court of Texas, held that the Lands Act neither intended nor required exclusive jurisdiction in the federal courts, becoming the only courts having considered the question to so hold.[3]

The applicability of the Lands Act to plaintiff's personal injury action against Respondent Mobil and its

3. Cases in direct conflict with the Court of Civil Appeals, holding that subject matter jurisdiction is exclusively federal, are *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), *Borne v. Tenneco Oil Company*, 1973 A.M.C. 388 (E.D. La. 1972), *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979), *Gravois v. Travelers Indemnity Company*, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301), and *Pool v. Kemper Insurance Group*, 386 So.2d 1006 (La. App. 1980). These decisions are discussed in the Petition for Writ of Certiorari and Petitioner's Reply Brief to Respondents' Briefs in Opposition to Petition.

contractual indemnity action against Petitioner was recognized by the Texas Court of Civil Appeals, which also acknowledged that the Lands Act establishes the structure of remedies for fixed platform workers on the outer Continental Shelf and substantively controls other disputes arising in the area governed by the Act, such as the subject contractual indemnity action. Consequently, the focus of Petitioner's disagreement with the Court of Civil Appeals is on the question of *exclusivity* of federal court subject matter jurisdiction over the remedies of workers such as the plaintiff and suits such as the contractual action brought by Respondent Mobil.

The opinion of the Court of Civil Appeals upholding state court subject matter jurisdiction hinged on the absence of the word "exclusive" in the statute's jurisdictional section, Section 1333(b). At the outset, it should be recognized that in the enactment of the Lands Act, Congress was not dealing with an area of concurrent federal and state political jurisdiction. Congress was not confronted with a situation requiring a specific grant of federal jurisdiction to the preclusion of an existing state right or jurisdiction, but was involved in extending federal jurisdiction into an international area outside of any historical area of state jurisdiction. A reading of the statute as a whole in the context of its enactment leads inevitably to the conclusion that Congress intended federal political jurisdiction, federal policy, and federal law in the Lands Act area to be judicially governed exclusively by the federal courts.

Petitioner does not ask that this Court augment the language of the statute by supplying any allegedly omitted terminology. Rather, Petitioner solicits this Court's recog-

nition that in the context of the enactment of the Lands Act, the statutory language employed by Congress clearly expresses a grant of jurisdiction over cases arising under the Act to the federal courts with no concurrent jurisdiction being extended to the states adjacent to the outer Continental Shelf area. Congress did not need to employ language granting "exclusive" jurisdiction to federal courts because the action of Congress in *extending* federal political jurisdiction into the void represented by the outer Continental Shelf area while rejecting a contemporaneous extension of concurrent state political jurisdiction into the area could lead to no other conclusion than that state power was not to be extended to apply in the area.

A. The Lands Act extension of federal, but not state, political jurisdiction to the shelf area made a specific grant of exclusive federal court jurisdiction unnecessary

The absence of the word "exclusive" in the section of the Lands Act granting jurisdiction to the federal district courts, Section 1333(b), is not significant in view of the context of the enactment of the Lands Act. Study of the hearings conducted by the Senate Committee on Interior and Insular Affairs, the Report of that Committee, and floor debate in connection with passage of the Senate bill (S. 1901[4]) makes it clear that the problem

4. Passage of a Lands Act bill was a legislative priority in 1953 as development of offshore mineral resources could not proceed in an orderly fashion until such a statute was passed. A bill was introduced in the House of Representatives to add a third section to the Submerged Lands Act. The bill introduced in the Senate represented independent legislation. The House legislation was passed by the House of Representatives and forwarded to the Senate for consideration. The Senate proceeded to consider its own bill and once it was

of legislating jurisdiction in the area of the outer Continental Shelf was *sui generis* vis-a-vis our system of federalism. The question of jurisdiction in the outer Continental Shelf area was unlike that involving military installations or national parks within the various states. With respect to the outer Continental Shelf, there was no historical state or federal political jurisdiction.

The report to the Senate Committee submitted on behalf of the Attorney General, set forth in the Committee Report, is particularly instructive in this regard:

> This *id est* [the outer Continental Shelf] is a Federal area, outside State boundaries and to give the States a sort of extraterritorial jurisdiction over it is unnecessary and undesirable. The situation is not comparable to that of federally owned areas within a State, as to which State law has some measure of applicability. Particularly in view of the intermingling of national and international rights in the area, it is important that the Federal Government, which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there.

S. Rep. No. 411, 83d Cong., 1st Sess. 6 (1953).

It is clear that Congress approached the question of political jurisdiction in the outer Continental Shelf area as one with international implications and that this was

---

in final form the Senate struck all of the House bill language after the enacting clause and amended the House bill by inserting the language of the Senate bill. The legislation went to conference and following changes immaterial to the subject matter jurisdiction issue, the legislation was reported favorably to both Houses and the Lands Act was passed. Consequently, the legislation bore the House bill number, but the Senate bill is essentially what became the Lands Act and the legislative history of the Senate bill is, therefore, pertinent.

a significant policy reason for unifying administration and enforcement in the Federal Government and courts. The task was to extend political jurisdiction into an international jurisdictional void and this sparked serious debate over the terminology to be used, i.e., whether *sovereignty* should be extended or some lesser concept such as "jurisdiction and control." The basis of the approach ultimately taken with respect to the legislation is found in the prepared statement to the Senate Committee by the deputy legal advisor to the Secretary of State, set forth in the Senate Report. S. Rep. No. 441, 83d Cong., 1st Sess. 41 (1953). The following excerpt from that text is illustrative:

> The assertion of jurisdiction and control in accordance with the President's 1945 proclamation is believed to be preferable to an assertion of sovereignty. Sovereignty, traditionally an absolute concept, might be regarded as affecting the freedom of the waters and the airspace above the seabed and subsoil despite the disclaimers to the contrary.

From this background it is evident that the legislative grant of jurisdiction to adjudicate embodied in Section 1333(b) of the Lands Act was, of necessity, an exclusive grant. Normally, our system of dual federal-state sovereignty would require adherence to the concept that the jurisdiction of federal district courts is limited, not general, and that jurisdiction to adjudicate exists concurrently in state courts unless the exclusivity of federal court jurisdiction is stated in specific, unequivocal language. In the area of the outer Continental Shelf, however, there was no historical system of dual federal-state sovereignty or concurrent political jurisdiction with con-

comitant jurisdiction to adjudicate. No question of "preemption" existed in regard to jurisdiction in that area. The question was to what extent federal political jurisdiction could be *extended* into the area, not to what extent it should be shared.[5]

It would have been redundant for Congress to modify the jurisdictional grant to federal district courts in Section 1333(b) of the Lands Act with the word "exclusive". Federal courts are generally courts of limited jurisdiction, dependent upon a specific grant of jurisdiction and, if desired, of "exclusive" jurisdiction. State courts are courts of general jurisdiction. However, in the outer Continental Shelf area there was no concurrent jurisdiction to adjudicate to be considered since state political jurisdiction and concomitant jurisdiction of the state courts to adjudicate did not extend over that area. This view of the grant of jurisdiction set forth in Section 1333(b) of the Lands Act is fully supported by the legislative history of the statute and, specifically, by the fact that opponents of the Lands Act sought on several occasions to amend the legislation under consideration to specifically extend state power to the outer Continental Shelf area and such efforts were consistently rejected.

This Court has previously made reference to one of these amendments in connection with the issue whether the Death on the High Seas Act was applicable in the

---

5. In *United States v. California*, 332 U.S. 19 (1947), this Court held that the states situated adjacent to the outer Continental Shelf had no title to or property interest in the three-mile marginal belt of submerged lands off their coast outside inland waters and that the Federal Government had paramount rights in and power over that area. Obviously, this analysis would apply with even greater force to the area of the outer Continental Shelf seaward of the three-mile marginal belt.

context of a wrongful death occurring on an artificial island in the area governed by the Lands Act. *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352, 359 (1969). As observed by this Court, Senator Russell Long of Louisiana unsuccessfully sought to amend the Act to make the laws of each adjacent state applicable to the newly acquired area and to make the officials of such states the agents empowered to enforce the laws of the state in the newly acquired area.

Actually, the amendment discussed in *Rodrigue* was the second amendment proposed by a Senator from Louisiana. The first was proposed by Senator Ellender and was considered immediately before Senator Long's amendment. The purpose of Senator Ellender's proposed amendment was stated most succinctly by its author:

> My amendment is very simple and it would clarify a multiplicity of problems which are bound to arise. It would give coastal States the right to extend their jurisdiction to these lands. For what purpose? Merely for the purpose of administering the criminal and civil laws which may pertain to that area.

99 Cong. Rec. 7230 (1953).

This amendment offered by the senior Senator from Louisiana, Senator Ellender, was opposed on the floor by Senator Cordon, manager of the bill on behalf of the Committee on Interior and Insular Affairs. The position of the Committee was expressed by Senator Cordon as follows:

> The issue is whether an area which is entirely outside the boundaries of a State in an area of exclusive Federal jurisdiction shall, in effect, be placed within the boundaries of an abutting State. The committee

> felt that the boundaries of the coastal States should not be so extended. I believe the Senate entertains the same view.

In response to a question posed by Senator Ellender concerning a hypothetical murder committed on an artificial island in the Lands Act area and, specifically, where the accused would be tried, Senator Cordon responded:

> The bill provides for jurisdiction by the district courts of the United States. So in the instance referred to by the Senator from Louisiana, jurisdiction would be either in the district court of the district in which the defendant was found or in the district court of the district nearest where the act occurred; and either represents jurisdiction within the meaning of the law and the Constitution.

99 Cong. Rec. 7231-7232 (1953).

Following limited debate on the first amendment offered by Senator Ellender, it was rejected. See 99 Cong. Rec. 7228-7232 (1953).

As indicated above, the second proposed amendment was that of Senator Long, which would have had the same effect as the one offered by Senator Ellender except that it did not provide for taxing power in the states. In explaining the amendment to the Senate, Senator Long recognized the distinction between the creation of an area of exclusive jurisdiction within a state and the extension of political jurisdiction into the void of the outer Continental Shelf in connection with jurisdiction to adjudicate. The Senator's explanation was as follows:

> Under the amendment I am proposing, the structures erected upon the subsoil would be treated as though

> they were erected on Federal lands located within the State. The Senator from Nevada is thoroughly familiar with Federal lands in the States, because the Federal Government owns most of the land of the great State of Nevada. When a crime is committed, the local sheriff can arrest the culprit, bring him back to the local district and incarcerate him there, and trial can be had in a State court before a jury of his peers. Otherwise, it is a matter of *exclusive* Federal jurisdiction, and it would be necessary to take the culprit to a Federal district court. Likewise, any dispute arising among citizens would have to be settled in a Federal district court. (Emphasis Supplied).

99 Cong. Rec. 7233 (1953).

Later in the debate, Senator Long commented on the effect of a possible failure of the amendment to pass:

> On the other hand, if the amendment fails of adoption, with respect to any disputes which may arise or with respect to violations of law, those accused or involved would have to be taken 100 miles away to the Federal district court at New Orleans, La.

99 Cong. Rec. 7234 (1953).

Senator Ellender spoke in support of Senator Long's amendment and, pertinent to the question of state court jurisdiction, had the following remarks:

> [W]hen the bill was first introduced, it contemplated having our maritime laws apply. In section 4, the laws applicable to the outer Continental Shelf were to be the same as those which apply to a ship. It was sought to treat the platforms or artificial islands created in the water as ships, thereby applying to those islands the same jurisdiction, so far as Federal

> laws are concerned, as in the case of ships, so that in the event a crime were committed on one of these artifical islands, the Federal Government would have jurisdiction under our maritime laws. However, in the course of the hearings, and when the bill was redrafted, that approach was discarded. These islands are made subject to our domestic law, to be administered *exclusively* through the Federal courts, rather than treating them as ships. (Emphasis supplied).
>
> * * *
>
> [U]nless the amendment is agreed to, and provided, of course, that an accused person did not invoke the sixth amendment, the District courts would have to try every little misdemeanor that occurred in the area, because section 4(2) of the bill provides that all such applicable laws—that is, State laws, Federal laws, and rules and regulations that may be made by the Secretary of the Interior—shall be administered by the appropriate officers and courts of the United States. *It excludes the State courts entirely*. (Emphasis supplied).

99 Cong. Rec. 7235 (1953).

As this Court noted in *Rodrigue*, Senator Long's amendment was rejected.

Finally, when the Senators from Louisiana were convinced that state political jurisdiction and concomitant state court jurisdiction to adjudicate were not to be extended into the outer Continental Shelf area, Senator Long proposed an amendment to make it clear that venue would be in the judicial district of the adjacent state. This clarifying amendment received the support of Senator Cordon, the manager of the bill on behalf of the Senate Committee and the amendment was adopted. Of par-

ticular interest is Senator Long's explanation of the purpose of the amendment:

> *Inasmuch as Congress has decided in favor of exclusive Federal jurisdiction when some case or controversy may arise on the outer Continental Shelf,* it should be made clear that the judicial district in which the case will be tried will be the judicial district which would be within the extended State lines, if the lines were to be extended under that section. (Emphasis supplied).
>
> * * *
>
> This amendment would simply make clear that those cases would be tried within one of the Federal districts within the State within the adjacent State.

99 Cong. Rec. 7257 (1953).

In summary, the context of the enactment of the Lands Act provides the answer as to why the Lands Act vests subject matter jurisdiction over cases arising under the Act exclusively in the federal courts without the necessity of the word "exclusive" in the grant of jurisdiction to the federal district courts. In retrospect, the answer is relatively simple. It was not necessary to specifically provide that federal court jurisdiction would be exclusive because absent concurrent state political jurisdiction in the area, state police power, including state court jurisdiction to adjudicate, could not exist in the area.

B. The statutory language of the Lands Act leaves no doubt that federal court jurisdiction is exclusive

Although it is clear from the background and development of the Lands Act, as discussed in the preceding

section, that jurisdiction over cases and controversies arising in the outer Continental Shelf area is exclusively federal, the statutory language of the Lands Act itself leaves no doubt concerning the exclusivity of federal court jurisdiction.

Plaintiff's accident occurred on September 22, 1975, and suit was originally filed on November 20, 1975 (R. 2). The indemnity action was filed by Respondent Mobil on February 10, 1977 (R. 16). Thus, the statutory references pertinent to this question are the provisions of the Lands Act as they appeared at those material times. The Lands Act was amended on September 18, 1978, and the section discussing federal court jurisdiction was renumbered, but, as will be discussed subsequently, absolutely no change material to the question of the exclusivity of subject matter jurisdiction in the federal courts was effected.

Section 1333 of Title 43 of the United States Code as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the outer Continental Shelf and all artificial islands and fixed structures erected thereon. Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceed-

> ings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose.

As discussed at length in the preceding section, the absence of the word "exclusive" in Subsection (b) is immaterial because Congress refused to extend state political jurisdiction to the outer Continental Shelf area. There being no state sovereignty in the area or concomitant jurisdiction to adjudicate, the fact that Congress granted jurisdiction to the federal district courts in Subsection (b) means, *ipso facto,* that such subject matter jurisdiction is exclusive.

Subsection (a) (1) provided that:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

This subsection extended federal political jurisdiction into the outer Continental Shelf area. As discussed, the absence of a concurrent extension of state political jurisdiction is extremely significant.

Subsection (a)(2) declared, and as amended still declares, the civil and criminal laws of the adjacent states

to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf and all artificial islands and fixed structures erected thereon to the extent that they are applicable and not inconsistent with federal laws and regulations.

The next to the last sentence of that subsection is particularly significant, as it provided, and still provides that:

> All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

This language is demonstrative of Congressional intent that subject matter jurisdiction exist exclusively in the federal courts. Had Congress intended that the applicable laws be enforced in state courts it would have said so. The unsuccessful amendments proposed by the Senators from Louisiana emphasize the intent of Congress that the laws applicable to the outer Continental Shelf area be enforced exclusively in the federal courts.

If further indicia of the exclusivity of federal jurisdiction over cases and controversies arising out of or in connection with operations conducted on the outer Continental Shelf is required, Subsection (a)(3) of Section 1333 should resolve any doubts. That subsection provided, and continues to provide that:

> The provisions of this section for adoption of State law as the law of the United States shall *never* be interpreted as a basis for claiming any interest in *or jurisdiction* on behalf of any State *for any purpose* over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (Emphasis supplied).

Finally, the policy of the United States with respect to its exercise of jurisdiction over the subsoil and seabed of the outer Continental Shelf is clearly set forth in 43 U.S.C. § 1332 (Supp. 1979), and this, in conjunction with the other expressions of exclusive federal jurisdiction found in the Act, works to clearly demonstrate that the adjacent states and their state courts have never historically or by legislative action had jurisdiction over matters arising in the outer Continental Shelf area.

C. The legislative history of the Lands Act conclusively demonstrates the understanding and intent of Congress that federal court jurisdiction over Lands Act cases would be exclusive

Respondent Mobil has expressed the view that legislative history may not be consulted to determine the meaning of unambiguous statutory language. (Mobil's Brief in Opposition to Petition p. 5). However, this Court has previously noted that such an approach is "an axiom of experience [rather] than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48 (1928). Petitioner concurs with this Court's view, expressed in *United States v. Dickerson,* 310 U.S. 554, 561-562 (1940):

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by ex-

> perience to be workable; they can scarcely be deemed to be incompetent or irrelevant.
>
> * * *
>
> The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

Legislative history in the form of the Report of the Senate Committee on Interior and Insular Affairs and debate on the floor of the Senate regarding proposed amendments to the Act has previously been discussed. There can be no doubt that it was the understanding of the Senate, whose bill with various unrelated amendments became the Lands Act, that the legislation would result in exclusive federal court jurisdiction. Similarly, it cannot be disputed that this was also the *intent* of the Senate in view of the rejection of amendments seeking to extend state political jurisdiction and concomitant jurisdiction to adjudicate.

Perhaps the most eloquent evidence of the intended effect of the Lands Act in regard to court jurisdiction is the Minority Report to the Report of the Senate Committee on Interior and Insular Affairs by Senator Russell Long of Louisiana. Senator Long reported as follows:

> Many thousands of Louisiana citizens who live under a long established and well understood system of both Federal and State law—enforced as the case might be by both Federal and State officials—under the provisions of this bill, will perform their labors in an area governed by a curious and complex mixture of Federal and State laws, administered only by Federal officials, with power in the Secretary of Interior to abrogate State laws by regulation. *A resident of Morgan City, La., who might become a party*

> *to litigation arising in the outer Continental Shelf, will bear the expense of having his rights litigated—no matter how insignificant they might be—in a Federal court many miles removed from his domicile, rather than in his nearby parish courthouse.* (Emphasis supplied).

S. Rep. No. 411, 83d Cong., 1st Sess. 66 (1953).

D. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) recognized, sub silentio, the exclusivity of federal court jurisdiction over Lands Act cases

Although the precise question presented herein was not at issue, the decision of this Court in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), clearly reflects in its consideration of the history of the passage of the Lands Act that the intention of the Act was that it vest exclusive jurisdiction in the federal courts. Discussing the hearings held before the Senate Committee on Interior and Insular Affairs with respect to the applicability of maritime law to injuries occurring on fixed structures on the outer Continental Shelf, the Court noted as follows:

> On the other hand, federal enforcement of the law in this area was insisted upon by the Department of Justice, and there was substantial doubt whether state law and jurisdiction could or should be extended to these structures. A federal solution was thought necessary. 395 U.S. 352, 364.

With respect to the compromise which emerged, the Court had these observations:

> The administration's opposition to committing these areas solely to the jurisdiction of state courts, state

> substantive law, and state law enforcement was recognized in that *the applicable law was made federal law enforceable by federal officials in federal courts.* But the special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families was also recognized by dropping the treatment of these structures as "vessels" and instead, over the objections of the administration that these islands were not really located within a State, the bill was amended to treat them "as if [they] were [in] an area of exclusive Federal jurisdiction located within a State." *State law became federal law federally enforced.* 395 U.S. 352, 365. (Emphasis supplied).

This Court's decision in *Rodrigue* was obviously based upon a careful reading of the legislative history of the Lands Act. As discussed in Subsection A, above, such a review of the background of the enactment of the Lands Act could lead to no conclusion other than that jurisdiction over cases and controversies arising in the Lands Act area was vested *exclusively* in the federal courts. Petitioner submits that such is reflected in this Court's carefully selected language in *Rodrigue.*

E. The 1978 amendments to the Lands Act did not alter the exclusivity of federal court jurisdiction

By amendment effective September 18, 1978, the Lands Act grant of jurisdiction to the federal district courts was removed from Section 1333 of Title 43 and inserted as Subsection (b)(1) of a new Section 1349.

The Court of Civil Appeals' opinion noted that the word "original" was omitted from the new jurisdictional section and attached significance to this omission. The

absence of the word "original" from the current text lends no support to Respondents' position regarding exclusivity, and, to the contrary, the 1978 amendments lend support to Petitioner's position. A grant of "jurisdiction" is indistinguishable from one of "original jurisdiction" insofar as the federal courts are concerned. Moreover, in view of the development of the Lands Act, i.e., the concept of extension of federal political jurisdiction without a concurrent extension of state political jurisdiction, the failure of the 1978 amendments to the Lands Act to set forth a clear grant of concurrent state political jurisdiction or jurisdiction to adjudiciate, changing the existing law, militates in favor of Petitioner's position. As the legislative history of the Lands Act reflects, Congress could not, by the simple device of omitting the word "original", empower state courts to hear cases arising under the Lands Act. What would be required would be amendatory language *extending* state political jurisdiction to the outer Continental Shelf such as was rejected time and again at the time of passage of the original Act.

Finally, legislative history regarding reincorporation of the jurisdictional provision previously found in Section 1333(b) into the new Section 1349(b)(1) reflects that the Conference Committee followed the House version of the amendment providing for jurisdiction in the district courts by simply *restating* Section 1333(b) of the 1953 law. S. Conf. Rep. No. 95-1091, 95th Cong., 2d Sess. 114 (1978).

Respondent Mobil's contractual indemnity action against Petitioner was dependent upon a finding of liability against it with respect to the plaintiff's action. No such judgment rendered by the trial court could be valid as it

lacked subject matter jurisdiction and, consequently, there was no predicate for the judgment of indemnity against Petitioner. Additionally, the third party action of Respondent Mobil was, itself, dependent upon the Lands Act and, consequently, the trial court was similarly without subject matter jurisdiction over that action. Again, no valid judgment of indemnity could be rendered.

The absence of subject matter jurisdiction over plaintiff's personal injury case against Respondent Mobil and its contractual indemnity case against Petitioner constitutes fundamental error. The trial court should not have retained jurisdiction and it had no power to render the judgment of contractual indemnity in favor of Respondent Mobil. Both the Court of Civil Appeals and Supreme Court of Texas should have dismissed the case for want of jurisdiction and had no power to affirm the judgment. A court that is without subject matter jurisdiction has no authority to render any judgment other than one of dismissal. *Southwestern Bell Tel. Co. v. City of Kountze,* 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976); *City of Beaumont v. West,* 484 S.W.2d 789 (Tex. Civ. App.—Beaumont 1972, writ ref. n.r.e.); and *Barnes v. Bituminous Casualty Corp.,* 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref. n.r.e.).

II.

THIS COURT'S DECISION IN LIEPELT IS APPLICABLE AND CONTROLLING IN THIS LANDS ACT CASE

The Court of Civil Appeals held that the trial court committed no error in denying Petitioner's requested Jury Instruction C, designed to make the jury aware that any

award of damages would not be subject to federal income taxation. This decision is in direct conflict with this Court's holding in *Norfolk & Western Railway Company v. Liepelt,* 444 U.S. 490 (1980). In *Liepelt,* this Court held that it was reversible error for the trial court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested a similar, brief and easily understood instruction, which was refused.[6]

A. The holding in Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980)

The *Liepelt* case brought before this Court, in the context of a wrongful death action brought under the Federal Employer's Liability Act (FELA), the dual issues:

1) Whether it was error for the trial judge to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings; and

2) Whether it was error for the trial judge to refuse to instruct the jury that any award of damages would not be subject to federal income taxation.

---

6. Petitioner's requested Instruction C was as follows:
You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes (R. 199), and printed in the Joint Appendix at page 12.

The holding of the Court was that it was reversible error for the trial court to:

1) Exclude evidence offered to show the effect of income taxes on the decedent's estimated future earnings; and

2) Refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

Central to the holding was the established view that questions concerning the measure of damages in actions predicated on federally created rights are federal in character and governed by federal law even where the action is pending in state court.

In Section II of the Opinion, regarding the requested jury instruction, this Court addressed the various policy considerations favoring the instruction, including the increased significance of federal income taxes, the "tax consciousness" of the American public, the fact that giving the instruction can do no harm and the fact that giving the instruction will eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

B. Procedural considerations — Petitioner's requested instruction was properly submitted and the error of its rejection was properly preserved

Respondents contend that Petitioner's requested jury instruction was not properly tendered and that the trial court's refusal to submit it was not properly preserved as

error. These allegations are entirely without merit. The requested instruction was based on reasonable inferences that might be drawn from the evidence, which is the appropriate legal standard in Texas. The error in refusing the instruction was properly preserved, as most eloquently demonstrated by the Court of Civil Appeals' discussion of the point on the merits in its opinion.

1. Properly Submitted

Under Texas procedure, a jury instruction is proper "if it finds support in any evidence of probative value or the reasonable inferences that may be drawn therefrom, and if it might be of some aid or assistance to the jury in answering the issues submitted." *Mejia v. Liberty Mutual Ins. Co.*, 544 S.W.2d 690 (Tex. Civ. App.—Houston [14th Dist.] 1976). Under Texas law, it is the duty of the trial court to give the jury, in its charge, the rule to be applied in ascertaining the damages. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex. 1973). The record clearly reflects probative evidence on the issue of damages and it cannot, in good faith, be denied that a reasonable inference that might be drawn from such evidence is that the damage award would be subject to federal income taxation. "Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party." *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). The requested instruction set forth the appropriate legal standard and clearly would have assisted the jury in determining the appropriate compensation for the plaintiff.

Contrary to Respondents' assertion, there is absolutely no *caveat* in the *Liepelt* opinion that the jury instruction

must be predicated on evidence in the record regarding federal income taxes. The two questions addressed in *Liepelt,* the admissibility of evidence and the appropriateness of a jury instruction, are separate and distinct from one another. The *Liepelt* holding regarding the appropriateness of such a jury instruction is grounded on policy considerations, including what an average juror is likely to assume regarding taxation of a damage award. The Court's holding in *Liepelt* is clearly predicated on the tax consciousness of the average juror and *not* on the evidence that such juror may have heard during the course of a particular trial.

Submission of the instruction was proper under Texas law and Petitioner's requested instruction complied with the applicable rule of procedure regarding such instructions. Rule 273, Texas Rules of Civil Procedure (Respondent Mobil's Brief in Opposition to Petition—Appendix B).

2. Properly Preserved

Respondents say that the failure to give Petitioner's requested *Liepelt* instruction was not preserved as error because the trial judge did not write the word "refused" on the requested instructions at the time of refusing them and signed his name only to the top instruction of a set of three instructions which he was refusing. Petitioner's requested instruction was clearly refused as it does not appear as part of the court's charge to the jury, but is undisputably part of the official court records. The three instructions Petitioner requested were stapled together in sequential order and the judge simply signed the top one to signify his refusal to submit them.

Respondents' "waiver" argument is entirely spurious, as most clearly evidenced by the fact that the Court of Civil Appeals found no waiver with respect to the point. The Court of Civil Appeals opinion addressed the question on the merits and the court obviously would not have done so had the point been waived as contended by Respondents. (Court of Civil Appeals Opinion—Joint Appendix beginning at page 19).

C. Liepelt is applicable and controlling in this Lands Act case

Although the *Liepelt* case addressed the jury instruction issue in the context of a wrongful death action brought under the Federal Employer's Liability Act (FELA), the holding is clearly applicable in this case arising under the Lands Act.

The Court of Civil Appeals recognized the applicability of the Lands Act to plaintiff's personal injury action against Respondent and its contractual indemnity action against Petitioner. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court held that under the Lands Act the applicable law is federal law with the law of the state adjacent to the fixed platform in question to be utilized only to fill "gaps" in the controlling federal law. Central to the *Liepelt* holding is the established view that questions concerning the measure of damages in actions predicated on federally created rights are federal in character and governed by federal law even when the action is pending in state court. Consequently, the law of the adjacent state in this case, Louisiana, and additionally, the law of the forum state, Texas, with respect to the requested jury instruction was irrelevant and the trial court should have given the requested instruction.

The *Liepelt* decision establishes the existence of federal law and policy on the question of such an instruction so that, under the Lands Act, reference to state law on the question was impermissible. That federal law and policy are expressed generally is clear as there can be no cogent reason for differentiating between such instructions in the context of actions brought under the FELA, the Lands Act, the Jones Act, or any of the other federal acts creating causes of action for personal injury. The evil addressed by this Court is the same in all of these areas and the remedy provided is well suited to all, as well.

Respondent Mobil's position is that *Liepelt* is inapplicable on the basis of the implicit assumption that national uniformity was rejected by Congress in the Lands Act. *See* Respondent Mobil's Brief in Opposition to Petition, p. 9-10. The argument fails because the assumption is incorrect. The Lands Act clearly provides for federal law to be applicable and state law to be used only to fill gaps in the federal law. Obviously, there is no gap in the federal law on the question of the appropriateness of a *Liepelt* jury instruction. The policy considerations relied upon in *Liepelt* clearly apply in Lands Act cases, as well as in FELA cases.

Respondent Gaedecke, disagreeing with Respondent Mobil, says that this is not a federally created statutory cause of action, but instead a common law negligence case. Consequently, the thrust of this Respondent's argument entails the desirability of "adopting" federal law as expressed by *Liepelt*. *See* Respondent Gaedecke's Brief in Opposition to Petition, p. 17-19. As indicated above, this approach is backwards. Federal law applies in the first instance and state law is to be utilized only where there is no federal law on the point.

Respondent Gaedecke's insistence that his cause of action was not derived from the Lands Act is simply incorrect.

In claiming that the plaintiff's cause of action for personal injury was predicated upon common law negligence, as opposed to federal law, Respondent Gaedecke's counsel has misperceived the entire structure of remedies established for fixed platform workers on the outer Continental Shelf. From both the statute and the interpreting case law, it is clear beyond peradventure that the rights of such workers are defined exclusively by the Lands Act and that the applicable law is federal law. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court held that fixed structures on the outer Continental Shelf are islands tantamount to federal enclaves in an upland state. Although the law of the state adjacent to the fixed platform in question may be utilized to fill "gaps" in the controlling federal law, such state law applies, not of its own force, but only as surrogate federal law.

The rights of a fixed platform worker on the outer Continental Shelf against his employer are defined exclusively by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (1978) as made applicable by the Lands Act, 43 U.S.C. § 1333(b). A fixed platform worker's rights against third parties, such as Respondent Mobil herein, are, in turn, governed by the provision of the Longshoremen's Act which defines such third party rights. 33 U.S.C. § 933. *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117 (5th Cir. 1978), *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), *Aymond v. Texaco, Inc.*, 554 F.2d 206 (5th Cir. 1977), and *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973).

Whether seeking compensation from his employer or litigating against an allegedly responsible third party, a fixed platform worker's rights are derived exclusively from the Lands Act and are controlled by federal law. Where federal law does not address a particular issue, such as in the case of actions for personal injury, the Lands Act provides that the law of the adjacent state is to be utilized to fill the gap in federal law. The state law utilized has effect, not *as state law*, but *as federal law*. As this Court held in *Rodrigue*, "[i]t is evident . . . that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law." 395 U.S. at 357.

The explicit holding of the Fifth Circuit Court of Appeals in *Bourg* is also instructive in this regard:

> [T]he Outer Continental Shelf Lands Act provides for extensive civil remedies for injuries which may occur to a worker on the Shelf. Section 1333(c) provides that the Longshoremen's & Harbor Workers' Compensation Act should apply in cases of disability or death of an employee working on a platform, and § 1333(a)(2) provides the workers on the Shelf any remedy which might be available under State law as long as that remedy is not inconsistent with Federal law. Thus, the Act allows a plaintiff any type of negligence, strict liability, or contract action which would be cognizable under state law. 578 F.2d at 1120.

That Respondent Gaedecke's cause of action could not have been predicated on common law negligence is made clear by the Fifth Circuit Court of Appeals in *Aymond*. There, the plaintiff sought to have applied a Louisiana statute providing for interest from the date of judicial demand as opposed to the date of entry of judgment. The

plaintiff argued that the Louisiana law was applicable independent of the Lands Act, alleging that the matter was in federal court by virtue of the diversity statute as opposed to the Lands Act. The court rejected this theory, analyzing the statutory language of the Lands Act and its interpretation by this Court in *Rodrigue,* and holding that the action was in federal court under the Lands Act so that the Louisiana law, applicable only *through,* not independent of, the Lands Act could be applied only if a gap existed in the federal law as to computation of interest.

Any suggestion that Respondent Gaedecke's action was based on common law negligence because the negligence complained of was land-based, i.e., Respondent Mobil's failure to order evacuation of the platform in a more timely fashion, would be misleading because it is the *status* of a platform worker, *not* his location at the time of an injury or the place of the allegedly negligent act that is controlling. In *In Re Dearborn Marine Service, Inc.,* 499 F.2d 263 (5th Cir. 1974), *cert. denied* 423 U.S. 886 (1975), the Fifth Circuit Court of Appeals held that the rights of the survivors of a platform worker who was killed while on an offshore oil field crew boat were governed by the Lands Act, and not maritime law or the Death on the High Seas Act, 46 U.S.C. § 761 (1975), because his *status* as a platform worker was of greater legal significance than his physical location at the time of his death. In *Louviere v. Shell Oil Company,* 509 F.2d 278, opinion denying rehearing, 515 F.2d 571 (5th Cir. 1975), the Fifth Circuit held Louisiana law applicable, as surrogate federal law pursuant to the Lands Act, in a personal injury action brought by a cook on a fixed offshore platform against the platform owner *and*

the manufacturer and seller of a hot water heater that exploded in the platform's living quarters. Obviously, the plaintiff's *status* as a fixed platform worker was controlling, as opposed to the land-based place of the allegedly negligent manufacture of the hot water heater involved.

As Respondent Gaedecke's personal injury case was, of necessity, predicated on rights created and controlled by the Lands Act, Respondent Gaedecke's assertion of common law negligence in an effort to make the *Liepelt* decision inapplicable is incorrect.

Finally, it is also clear that the *Liepelt* rule of law is controlling in this matter even though the decision was handed down after the trial court's refusal of the requested instruction. In *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir. 1980), the question of retroactive application of the *Liepelt* holding was addressed and the position that it should not be applied retroactively rejected. The court found that retroactive application of the rule of law established in *Liepelt* would not result in "manifest injustice." A similar result was reached in *Cazad v. Chesapeake & Ohio Ry.*, 622 F.2d 72 (4th Cir. 1980), a case tried prior to *Liepelt*, but pending on appeal when *Liepelt* was decided, in which the Fourth Circuit reversed for failure to give a proffered instruction which was substantially identical to the instruction required in *Liepelt*.

The *Liepelt* decision was brought to the attention of the Supreme Court of Texas by Supplemental Brief, but was evidently ignored. Petitioner's view is that suggestions of "manifest injustice" in applying *Liepelt* at this stage are not well taken. A greater injustice would be done in not applying that holding in light of the fact that Petitioner informed the trial court of the appropriate law and

requested an appropriate instruction, the giving of which could not possibly have caused any harm. Petitioner is at a loss to explain what more it could have done to protect its rights in this regard.

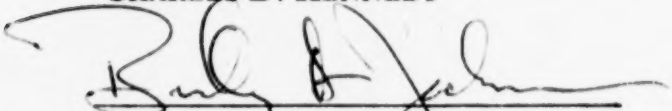
Under these circumstances, this Court should do simple justice by reversing the decision of the Court of Civil Appeals, mandating a new trial.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas and order the case dismissed for want of subject matter jurisdiction. Alternatively, the Court should reverse the judgment and order the case remanded to the trial court for a new trial due to the failure to instruct the jury as requested by Petitioner. Costs should be taxed against Respondent Mobil Oil Corporation.

Respectfully submitted,

CHARLES D. KENNEDY



BRADLEY A. JACKSON

Attorneys for Petitioner

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief for Petitioner have been served on all parties required to be served, *i.e.*, on Respondent by hand delivery at the office of its counsel of record Frank Caton, Esq., Crain, Caton, James and Womble, 3300 Two Houston Center, Houston, Texas 77010, and on the Plaintiff in the trial court by hand delivery at the office of his counsel of record, Joseph D. Jamail, Esq., Jamail, Kolius & Mithoff, 3300 One Allen Center, Houston, Texas 77002, this 22nd day of January, 1981.

CHARLES D. KENNEDY

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of Record for Respondent Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED FOR REVIEW[1]

Respondent Gaedecke, being dissatisfied with the presentation of petitioner, submits the following:

1. Does new Section 23 of Section 208 (43 U.S.C. § 1349) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629, 657-659), "Citizen Suits, Court Jurisdiction, and Judicial Review," give federal courts *EXCLUSIVE* jurisdiction over this common law negligence action for personal injury?

2. Does this court have *jurisdiction* to consider the subject of federal income taxes in computing damages when petitioner *failed to comply with Texas procedure* in requesting the Texas district court, where the case was tried, to instruct the jury that any damage award to plaintiff Gaedecke is not income to him within the meaning of the federal income tax law?

3. (a) Assuming *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (February 19, 1980) is applicable to the case at bar, is the failure to submit a nontaxability damage instruction to the jury harmless error under the facts of this case?

(b) Should the holding of this court in *Liepelt,* a *Federal Employer's Liability Act ("FELA") wrongful death case* approving a jury instruction not to consider federal income taxes in fixing its award, be applied to this *common law negligence case for personal injury governed by the law of Louisiana?*

---

1. Parties to the proceeding in the court whose judgment is sought to be reviewed are: Gulf Offshore Company, a Division of the Pool Company, Mobil Oil Corporation and Steven Gaedecke. They are sometimes referred to by abbreviated name—"Gulf," "Mobil," "Gaedecke."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW AND LIST OF PARTIES	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
JURISDICTION AND A PARTIAL OBJECTION THERETO	1
STATUTES WHICH THE CASE INVOLVES	6
STATEMENT OF THE CASE	11
SUMMARY OF THE ARGUMENT	12
ARGUMENT	
I. THE TEXAS COURTS HAD SUBJECT MATTER JURISDICTION OF THIS CASE, AND EXCLUSIVE JURISDICTION IS NOT, AND NEVER WAS, IN THE FEDERAL COURTS	16
1. *The 1953 Outer Continental Shelf Lands Act*	16
2. *The Outer Continental Shelf Lands Act Amendments of 1978*	17
2a. *Legislative intent of the 1978 Amendments*	18
2b. *Repeal of former 43 U.S.C. § 1333(b)*	22
3. *Concurrent Jurisdiction*	24
4. *Historical State Court Jurisdiction on the Shelf*	26
5. *As Congress Did Not Grant the Federal Courts Exclusive Jurisdiction Over Torts Arising On the Shelf, Gaedecke Could Pursue His Historical Common law Remedy in Any Court That Had In Personam Jurisdiction Over Mobil*	29
II. NORFOLK & WESTERN RAILWAY COMPANY v. LIEPELT, 444 U.S. 490, 100 S.CT. 755, 62 L.ED. 689 (1980) IS NOT APPLICABLE TO THIS CASE; BUT IF IT IS, FAILURE TO CHARGE THE JURY AS TO FEDERAL INCOME TAXES WAS HARMLESS ERROR UNDER THE FACTS OF THIS CASE	30

Page

1. *Assuming Arguendo Liepelt Applies to the Instant Case, Failure to Charge the Jury as to Federal Income Taxes Was Harmless Error* 30

2. *Liepelt Is a FELA Statutory Wrongful Death Case and Does Not Apply to the Case at Bar, a Common Law Negligence Case for Personal Injury Governed by the Law of Louisiana* 34

3. *Congress Created No Statutory Cause of Action for Personal Injuries by Enacting the Lands Act* 36

4. *As No Evidence Regarding Federal Income Tax Was Introduced by Gulf, Liepelt is Inapplicable to the Case at Bar* 39

5. *On Equity and Justice* 40

CONCLUSION 42

CERTIFICATE OF SERVICE 44

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

LIST OF AUTHORITIES

CASES

Page

Aldinger v. Howard, 427 U.S. 1, 15 (1976) 16

Alyeska Pipeline Service Co. Wilderness Society, 421 U.S. 240 (1975) 21

Bardes v. First National Bank of Hawarden, 178 U.S. 539 (1900) 24

Bertrand v. Shell Oil Company, 489 F.2d 293, 294 (5th Cir. 1973) 34

Borne v. Tenneco Oil Company, 1973 A.M.C. 388 (E.D. La.) 23

Bourg v. Texaco Oil Co., Inc., 578 F.2d 1117, 1120 (5th Cir. 1978) 37

Bradley v. School Board of Richmond, 416 U.S. 696, 721 (1974) 23

CASES

	Page
Brown v. City Service Co., 245 S.W.2d 656, 657 (Tex. Comm. App. 1922, holding approved)	3
Bruner v. United States, 343 U.S. 112, 116 (1952)	22
62 Cases, Etc. v. United States, 340 U.S. 593, 596 (1951)	16
Cazad v. Chesapeake & Ohio Railway, 622 F.2d 72 (4th Cir. 1980)	40
Chaflin v. Houseman, 93 U.S. 130 (1876)	24
Chappel v. Bradshaw, 128 U.S. 132 (1888)	5
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	24
Chesapeake and Ohio Railway Company v. De Atley, 241 U.S. 310, 317 (1916)	5
Chevron Oil Company v. Huson, 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296 (1971)	25, 34, 35, 36
Cochran v. Wool Growers Central Storage Company, 166 S.W.2d 904, 906 (Tex. 1942)	3
Cort v. Ash, 422 U.S. 66 (1975)	37
Couch v. Steel, 3 E. & B. 402, 118 Eng. Rep. 1193 (Q.B. 1854)	38
Croce v. Bromley Corp., 623 F.2d 1084, 1096, 1097 (5th Cir. 1980)	35
Cunningham v. Bay Drilling Co., 421 F.2d 1398, 1399 (5th Cir. 1970)	41
Deep Seabed Hard Mineral Resources Act of June 28, 1980, (94 Stat. 553, 580)	17
Dennick v. Central Railroad Company v. R. R. Co., 103 U.S. 11 (1881)	30
de Rodulfa v. United States, 461 F.2d 1240, 1250, n.50, 51 (D.C. Cir. 1972), cert. den., 409 U.S. 949	23
Dickerson v. Continental Oil Company, 449 F.2d 1209, 1213, 1215 (5th Cir. 1971)	35
Draisma v. United States, 492 F.Supp. 1317, 1327 (W.D. Mich. 1980)	37
Edelman v. People of State of California, 344 U.S. 357, 359 (1953)	2
Estate of Spinosa, 621 F.2d 1154, 1158, 1159 (1st Cir. 1980)	35, 41
Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. Sept. 4, 1980)	31, 32, 41
Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 (E.D. La. 1972)	23
Friedrich v. Whittaker Corporation, 467 F.Supp. 1012 (S.D. Tex. 1979)	23
Gevinson v. Manhattan Const. Co. of Oklahoma, 449 S.W. 2d 458, 465, n.2 (Tex. 1969)	38

CASES

	Page
Gonzalez v. Texas Department of Human Resources, 581 S.W.2d 522, 526 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.), cert. den. 100 S.Ct. 1079	5
Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La.App. 1965), writ ref'd 175 So. 301	23
Great American Insurance Co. v. Langdeau, 379 S.W.2d 62, 70 (Tex. 1964)	3
Greco v. Seaboard Coastline R.R., 464 F.2d 496, 497 (5th Cir. 1972)	41
Green v. Rudsenske, 320 S.W.2d 228, 236 (Tex. Civ. App. —San Antonio 1959, no writ)	33
Healy v. Raeta, 292 U.S. 263, 270 (1934)	25
Herndon v. Georgia, 295 U.S. 441, 443 (1935)	3
Houston East & West Texas Ry. Co. v. Matthews, 12 S.W. 2d 163, 164 (Tex. Comm. App. 1929, holding approved)	4, 5
Ingle v. Illinois Cent. Gulf R. Co., 608 S.W.2d 76, 83 (Mo. App. 1980)	32, 34, 41, 42
Iselin v. United States, 270 U.S. 245, 250 (1926)	16
Johnson v. Penrod Drilling Co., 510 F.2d 234, 236, 237 (5th Cir. 1975, en banc), cert. den. 423 U.S. 839	41
Jones v. Smith, 466 S.W.2d 47, 49 (Tex. Civ. App.—Fort Worth, 1971, writ ref'd n.r.e.)	4
Kermarec v. Campagnie Generale Transatlantique, 358 U.S. 625, 629 (1959)	31
Kotteakos v. United States, 328 U.S. 750, 762 (1946)	31
Lang v. Texas Pacific Railway Co., 624 F.2d 1275 (5th Cir. 1980)	40
Madruga v. Superior Court of California, 346 U.S. 556, 560, n.12 (1954)	27
Martinez v. State of California, 444 U.S. 277, n.7 (1980)	24
Merchants Insurance Co. v. Ritchie, 5 Wall. 541 (1866)	22
Missouri K. & T. Ry. Co. v. Beadsley, 155 S.W. 183, 187 (Tex. 1913)	33
Missouri-Kansas-Texas Railroad Co. v. McFerrin, 291 S.W. 2d 931, 935 (Tex. 1956)	41
Missouri K. & T. Ry. Co. v. Strafford, 31 S.W. 319 (Tex. 1895)	4
Moczygemba v. Danos & Curiole Marine Contractors, 561 F.2d 1149, 1151, n.1, (5th Cir. 1977)	34
Monger v. Florida, 405 U.S. 958 (1972)	5
Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 308 (1903)	2
New Jersey Steam Nav. Co. v. Merchants Bank of Boston, 47 U.S. (6 How.) 344 (1848)	27
Newman v. Delhi Gas Pipeline Co., 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ)	4

CASES

	Page
Nielson v. Lagow, 53 U.S. 98, 110 (1851)	5
Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (Feb. 19, 1980)	*passim*
Olsen v. Shell Oil Company, 561 F.2d 1178, 1190 (5th Cir. 1977), cert. den. 444 U.S. 979	38
Ormsby v. Chase, 290 U.S. 387 (1933)	30
Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)	16
Palmer v. Hoffman, 318 U.S. 109, 116 (1943)	31
Panama R. Co. v. Vasquez, 271 U.S. 557 (1926)	28
Pirie v. Chicago Title and Trust Co., 182 U.S. 438 (1900)	24
Pool v. Kemper Insurance Group, 386 So.2d 1006 (La.App., May 21, 1980)	23
Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997, 998 (5th Cir. 1964)	41
Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994 (Ark. Supp. 1952)	30
Rodrique v. Aetna Casualty Company, 395 U.S. 352, 365 (1969)	34
Romero v. International Terminal Operating Co., 358 U.S. 354, 361 (1959)	27, 28
Rounds v. Cloverport Foundry & M. Co., 237 U.S. 303 (1915)	28
Saunders v. Shaw, 244 U.S. 317, 320 (1916)	3
Sierra Club v. Morton, 405 U.S. 727 (1972)	19
State of Missouri v. Gehner, 281 U.S. 313, 320 (1930)	3
Sun Ship, Inc. v. Pennsylvania, 100 S.Ct. 2432, 2437 (1980)	24
Testa v. Katt, 330 U.S. 386, 394 (1947)	24
Texas Gas Utilities Company v. Barrett, 460 S.W.2d 409, 417 (Tex. 1970)	3
Texas & P. Coal Co. v. Lawson, 34 S.W. 919, 921 (Tex. 1896)	3
The Hamilton (Old Dominion S.S. Co. v. Gilmore), 207 U.S. 398, 404 (1907)	28
Turner v. General Motors, 584 S.W.2d 844, 853 (Tex. 1979)	38, 39, 41
United States v. Bank of New York Trust Co., 296 U.S. 463, 479 (1936)	24
United States v. Cooper Corporation, 312 U.S. 600, 605 (1941)	16, 17
United States v. State of Alabama, 362 U.S. 602, 604 (1960)	23
United States v. Students Chal. Reg. Agcy. Pro., 412 U.S. 669 (1973)	19

CASES

	Page
Vasina v. Grumman Corp., 492 F.Supp. 943, 945 (E.D.N.Y. 1980)	35
Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971)	25
Walker v. Tenneco Oil Co., 615 F.2d 1121, 1123 (5th Cir. 1980)	34
Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921)	28
Western Union Teleg. Co. v. Case Publishing Co., 181 U.S. 92, 101, 102 (1901)	36
Wolfe v. State of North Carolina, 364 U.S. 177, 195 (1960)	2
Ziffrin, Inc. v. United States, 318 U.S. 73, 78 (1943)	23

UNITED STATES CODE

28 U.S.C. § 1257(3)	1, 5
28 U.S.C. § 1333	14, 26, 27
28 U.S.C. § 1346(b)	37
28 U.S.C. § 2111	31
28 U.S.C. § 2674	37
43 U.S.C. § 1333(a)(1)	6
43 U.S.C. § 1333(a)(2)	6, 10, 20, 34
43 U.S.C. § 1333(b)	6, 13, 16, 18, 20, 29
43 U.S.C. § 1349	6, 17, 20, 22
43 U.S.C. § 1349(a)	20
43 U.S.C. § 1349(a)(b)	20
43 U.S.C. § 1333(a)(2)(A)	10, 30, 34
43 U.S.C. § 1359(a)(6)	19
43 U.S.C. § 1349(b)	22
43 U.S.C. § 1349(b)(1)	*passim*
43 U.S.C. § 1349(b)(1)	13, 18, 19, 20, 23

SUPREME COURT RULES

Rule 30	2
Rule 30.2	2
Rule 30.3	2
Rule 31(g)	11

TEXAS RULES OF CIVIL PROCEDURE

Rule 184a	38
Rule 276	4
Rule 481	3

Page

TEXTS

20 Am. Jur. 2d *Courts* § 123 at p. 478 (1965) 30
1 BENEDICT ON ADMIRALTY, § 122, p. 8-3, n.2 (7th rev. ed. 1974) 27
1 BENEDICT ON ADMIRALTY, § 122, pp. 8-8-9 (7th rev. ed. 1974) 27
GILMORE & BLACK, THE LAW OF ADMIRALTY 37, 40 (2d ed. 1975) 27
HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 34 (1959) 5
3 MCDONALD, TEXAS CIVIL PRACTICE § 12.36.1, n.59, p. 431 (rev. ed. 1970) 4
7A MOORE'S FEDERAL PRACTICE ¶ .210, pp. 2202, 2203 (1979) 27, 29

MISCELLANEOUS

Annot. 63 ALR 2d 1393 (1959) 41
Hill, *The Law Making Power of The Federal Courts, Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967) 36
Kaeven, *A Report on the Jury Project*, Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-68 (1957) 31
LEWIS CARROLL, ALICE IN WONDERLAND, Chapter XII, *Alice's Evidence*, Random House, New York (1965), p. 141 42
Rogers, *Handbook on Environmental Law* § 1.13, (1977) .. 19
Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MODERN L. REV. 233 (1960) 38
124 Cong. Rec. H 499 21
124 Cong. Rec. H 508 18
124 Cong. Rec. H 8390 18
124 Cong. Rec. H 8399 21
124 Cong. Rec. H 8400 ..... 19, 21
124 Cong. Rec. H 10007 18
124 Cong. Rec. H 16689 20

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE

JURISDICTION AND A PARTIAL OBJECTION THERETO

1. Gaedecke concedes that this Court has jurisdiction under 28 U.S.C. § 1257(3) to consider the question of exclusive jurisdiction, *vel non*, of United States district courts under Section 23(b)(1) of Section 208 of the "Outer Continental Shelf Lands Act Amendments of 1978" to the original 1953 Lands Act (43 U.S.C. § 1349(b)(1)).

2. He denies that this Court has jurisdiction to consider the Texas trial court's failure to instruct the jury to exclude federal income taxes in computing damages because, even if this is a federal question, Gulf did not preserve the matter for review in accordance with the Texas Rules of Civil Procedure. To maintain jurisdiction on the ground that a state court has denied a federal right that right must be asserted according to state practice and procedure. *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 308 (1903); *Wolfe v. State of North Carolina,* 364 U.S. 177, 195 (1960). Failure to do so "is an adequate state ground for a decision below." *Edelman v. People of State of California,* 344 U.S. 357, 359 (1953).

3. After Gulf called the attention of the Texas Supreme Court, prior to its judgment, to the pendente lite decision of this Court in *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (Feb. 19, 1980), concerning jury instructions on income tax in FELA cases (Gulf's Supplemental Brief of the Argument Under The Twelfth Point), Gaedecke immediately objected to its consideration because it had been waived (Gaedecke's Reply to Petitioner's Supplemental Brief Under Its Twelfth Point, p. 3).[2]

As *Liepelt* is against a mountain of contrary authority, the ruling of this Court in that case could not have been

---

2. Gaedecke attempted under S.Ct. Rule 30 to have his short objection, which is in the certified record, included in the Joint Appendix. But counsel for petitioner refused to include it, according to him, *in accordance with the instructions of the Clerk of this Court.* As we read the rule, the Joint Appendix is to be prepared by the parties, *not the Clerk.* Rule 30.3. We are therefore compelled to inconvenience the Court by referring to relevant portions of the record that have not been printed. Rule 30.2.

reasonably anticipated. Thus, it was in the Texas Supreme Court that the first opportunity arose (and in fact the first necessity) for raising Gulf's waiver of its right to complain of the refusal of its requested instruction. *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Saunders v. Shaw,* 244 U.S. 317, 320 (1916); *State of Missouri v. Gehner,* 281 U.S. 313, 320 (1930), complaint first raised in motion for rehearing in state supreme court.

Liepelt was both a judicial innovation and a surprise (See p. 41, *infra*). The Texas Supreme Court has broad license to consider matters not either suggested to the trial court or presented to the Court of Civil Appeals. See *Texas Gas Utilities Company v. Barrett,* 460 S.W.2d 409, 416, 417 (Tex. 1970); *Texas & P. Coal Co. v. Lawson,* 34 S.W. 919, 921 (Tex. 1896). And in doing so it may look to the transcript as to any facts not passed on by the Court of Civil Appeals. *Brown v. City Service Co.,* 245 S.W.2d 656, 657 (Tex. Comm. App. 1922, holding approved).

Further, Tex. R. Civ. P. 481 (Appendix A hereto) permits amendment of a reply to an application for a writ of error "at any time when justice requires." The rule is applied liberally. *Great American Insurance Co. v. Langdeau,* 379 S.W.2d 62, 70 (Tex. 1964); *Cochran v. Wool Growers Central Storage Company,* 166 S.W.2d 904, 906 (Tex. 1942).

(a) We objected in the Texas Supreme Court because:

> *As the record fails to show that the trial judge acted on Gulf's requested Instruction C, directing the jury not to consider federal income taxes in awarding damages, any error was waived and presents nothing for appellate review.* (Gaedecke's Reply, *supra,* pp. 2, 3).

Tex. R. Civ. P. 276 (Appendix B hereto) provides that when a requested instruction is refused by the trial judge, "he shall endorse thereon 'Refused' and sign the same officially." Gulf's requested Instruction No. C *does not show it was either presented to or acted upon by the trial judge* (Chinese copy at J.A. 12). It was therefore waived and presented nothing for review. *Newman v. Delhi Gas Pipeline Co.*, 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ); *Jones v. Smith*, 466 S.W.2d 47, 49 (Tex. Civ. App.—Fort Worth, 1971, writ ref'd n.r.e.); 3 McDONALD, TEXAS CIVIL PRACTICE § 12.36.1, n.59, p. 431 (rev. ed. 1970). It is only after the requested instruction is endorsed "Refused" that Rule 276 makes it a bill of exceptions. *Newman, supra.*

It is true that the trial judge *signed*, but did not refuse, Gulf's requested Instruction A, but he *did not either sign or endorse "Refused"* on requested Instruction C as to federal income taxes (J.A. 11, 12). His naked signature on A is meaningless to show C was refused, even assuming requested Instructions A, B and C were filed together.

(b) We further objected in the Texas Supreme Court because:

> *As Gulf presented no evidence whatsoever as to federal income taxes it was not entitled to a jury instruction on the subject.* (Gaedecke's Reply, *supra*, p. 3).

It is uniformly held by the Texas courts that jury instructions should not be given as to any matter not raised by the evidence. *Missouri K. & T. Ry. Co. v. Strafford*, 31 S.W. 319 (Tex. 1895); *Houston East & West Texas Ry. Co. v. Matthews*, 12 S.W.2d 163, 164

(Tex. Comm. App. 1929, holding approved); *Gonzalez v. Texas Department of Human Resources,* 581 S.W.2d 522, 526 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.), cert. den. 100 S.Ct. 1079; HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 34 (1959).

Petitioner does not assert that any evidence was introduced regarding federal income taxes, and none was in fact introduced. With no evidence there was no legal basis to submit requested Instruction C under Texas procedure.

Jury issues in a case based on a federal statute and tried in a state court must be given in accordance "with local rules of practice and procedure." *Chesapeake and Ohio Railway Company v. De Atley,* 241 U.S. 310, 317 (1916).

In *Monger v. Florida,* 405 U.S. 958 (1972), this Court denied a petition for certiorari to the Supreme Court of Florida because, contrary to state rules of appellate procedure, the petitioner filed a notice of appeal after the oral entry of judgment but before a written nunc pro tunc order. Respondent said the state rules of appellate procedure were necessary "to avoid chaotic and haphazard appellate proceedings," and in any event the action of the Florida Court *rested upon an adequate state ground* and thus not within this Court's certiorari jurisdiction under 28 U.S.C. § 1257(3). This Court agreed.

It is submitted that the Court has improvidently granted a writ to consider the applicability of *Liepelt* to this case. The record contains no bill of exceptions perfected in accordance with state procedure. *Chappell v. Bradshaw,* 128 U.S. 132 (1888); *Nielson v. Lagow,* 53 U.S. 98, 110 (1851).

STATUTES WHICH THE CASE INVOLVES

Gulf cites Section 1333(a)(1), (2) and (b) of Title 43 of the United States Code as being the statutes which the case involves (Brief for Petitioner, p. 2-4). Sections (a)(1) and (b) are from the original 1953 Lands Act (67 Stat. 462, c. 345, § 4). However, when counsel refers to Section 1333(a)(2), Brief for Petitioner, pp. 3, 4), he quotes the Act as amended in 1975 and in 1978 and numbers it incorrectly. See 88 Stat. 2146; 92 Stat. 635.

This case actually turns on the "Outer Continental Shelf Lands Act Amendments of 1978," Pub. L. 95-372, 92 Stat. 629, September 18, 1978.

Section 208 of the 1978 Amendments, 92 Stat. 649, amends the 1953 Lands Act by adding a "new" Section 23 (43 U.S.C. § 1349, 92 Stat. 657-659), viz.,

> SEC. 23. CITIZEN SUITS, COURT JURISDICTION, AND JUDICIAL REVIEW.—(a)(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act.
>
> (2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropirate (sic) Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropirate (sic) Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions

allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act, or the terms of any permit or lease issued by the Secretary under this Act, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b)(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this Act. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose. (Emphasis ours.)

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c)(1) Any action of the Secretary to approve a leasing program pursuant to section 18 of this Act shall be subject to judicial review only in the United States Court of Appeal for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this Act and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28, United States Code. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record con-

sidered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(d) Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way.

Section 203(a) of the 1978 Amendments, 92 Stat. 635, amended 43 U.S.C. § 1333(a)(2), Section 4 of the original 1953 Lands Act, gave it a new number, (a)(2)(A), and it now reads as follows as 43 U.S.C. § 1333 (a)(2)(A):

(a)(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of

such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

STATEMENT OF THE CASE

Gaedecke submits the following statement of the case because of Gulf's omission of complete references to the Joint Appendix or the record as required by Supreme Court Rule 31(g):

This common law negligence action for personal injury was filed on November 20, 1975 by Gaedecke, as plaintiff, in the 215th District Court of Harris County, Texas against Mobil, L.A. Levy, Inc., and Arthur Levy Boat Service, Inc. He sued for injuries sustained on September 22, 1975 aboard a boat provided by Mobil for his negligently delayed emergency evacuation from a drilling platform owned by Mobil. The boat was owned by "Levy" and operated by "Boat Service" (Tr. 2).[3] The platform was located outside territorial waters in the Gulf of Mexico off the Louisiana coast (S.F. 35, 36; Tr. 128).

Gaedecke was an employee of Gulf, and Mobil, on February 16, 1977 sued Gulf as a third party defendant for contractual indemnity (Tr. 19). Gaedecke added Offshore Crews as a defendant (Tr. 31). Employers' National Insurance Company was an intervenor (Tr. 291).

Prior to trial, "Levy," "Boat Services" and "Offshore" were non-suited by Gaedecke (Tr. 291).

---

3. References to the record are: District Clerk's Transcript (Tr., followed by the page); Court Reporter's Transcript (S.F., followed by the page).

Trial, which began on November 20, 1978 in the 129th District Court of Harris County, Texas, was to a jury. Based on answers to special issues finding Mobil guilty of negligence, causation and damages, the district court on December 18, 1978 rendered judgment for Gaedecke against Mobil for $900,000.00, less $32,712.09 payable to "Employers'," and granted Mobil indemnity from Gulf for all sums it was required to pay under the judgment (Tr. 291).

Gulf appealed to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, which, on December 12, 1979, affirmed the judgment of the district court (J.A. 37), and on January 9, 1980, overruled Gulf's motion for rehearing (J.A. 38). Gulf then filed an application for a writ of error in the Texas Supreme Court, which was "Refused, No Reversible Error" on June 18, 1980 (J.A. 40). Gulf's motion for rehearing in that court was overruled on July 16, 1980 (J.A. 41).

SUMMARY OF THE ARGUMENT

I.

STATE AND FEDERAL COURTS HAVE CONCURRENT JURISDICTION UNDER THE LANDS ACT

1. Federal courts, as opposed to state courts of general jurisdiction, are courts of limited jurisdiction and must confine their jurisdiction to the precise limits the Lands Act has defined. The original 1953 Lands Act gave federal district courts *"original jurisdiction"* of controversies arising out of operations on the Shelf. 43 U.S.C. § 1333(b). It does not even suggest *"exclusive jurisdiction"* in the federal courts.

2. On *September 18, 1978,* Congress enacted the Outer Continental Shelf Lands Act Amendments of 1978 adding a *new* jurisdictional provision (Section 23(b)(1) of Section 208) in lieu of the 1953 jurisdictional provision in 43 U.S.C. § 1333(b). Section 23 is entitled, "Citizens Suits, Court Jurisdiction and Judicial Review." Section 23(b)(1) gives federal district courts *"jurisdiction,"* not exclusive jurisdiction. This was the law when this case was tried in the Texas district court (November 20-22, 1978), when final judgment was rendered in that court (December 18, 1978), in the Texas Court of Civil Appeals (December 12, 1979) and in the Texas Supreme Court (June 18, 1980). See J.A. 2-4.

3. All three Texas courts were thus obligated to apply the pendente lite statutory law which was in effect at the time they rendered their respective judgments: that was the new 1978 Lands Act Amendments (Section 23(b)(1) provision for "Jurisdiction." They did not have authority to add the word *"exclusive"* to Section 23(b)(1), codified as 43 U.S.C. § 1349(b)(1); nor does this Court.

4. *Alternatively,* the legislative history of the 1978 Amendments shows (a) they were a comprehensive revision of the entire 1953 Lands Act; (b) rights under the common law were not barred; (c) the jurisdictional section, 43 U.S.C. § 1349(b)(1), relates *only* to citizen suits; and (d) state court jurisdiction over personal injury claims were not disturbed by the Act.

5. However, even if the 1953 Act and 1978 Amendments give the federal courts jurisdiction over common law personal injury suits the grant of jurisdiction to a

federal court does not either imply a denial of historic state court jurisdiction or give a federal court *exclusive* jurisdiction. Even when state court litigation is based on a federal statute, the state courts have concurrent jurisdiction with the federal courts. It follows that under the original 1953 Lands Act, and as amended in 1978, both state and federal courts have and have had *concurrent* jurisdiction over the case at bar.

6. In 1953 historic state court jurisdiction existed on the Shelf by virtue of the "savings clause" in 28 U.S.C. § 1333. On that date state courts had jurisdiction under the common law to adjudicate in personam maritime claims, including a cause of action for personal injury. If Congress wanted the Lands Act to give the federal courts *exclusive* jurisdiction of such claims, it was obliged to do so by unequivocal statutory language so stating. It did not do so in either the original 1953 Act or the 1978 Amendments.

7. As Congress did not grant the federal courts exclusive jurisdiction over torts on the Shelf, and the states had historical jurisdiction over such torts, Gaedecke was free to sue Mobil in the Texas courts. His cause of action was transitory and he obtained personam jurisdiction over Mobil. The only effect of the Lands Act was to require that the case be governed by the Law of Louisiana.

II.

NORFOLK & WESTERN RY. CO. V. LIEPELT, 444 U.S. 490, 100 S.CT. 755, 62 L.ED. 689 (1980) IS NOT APPLICABLE TO THE CASE AT BAR

1. The case at bar is not an excessive verdict case unsupported by the evidence, as was *Liepelt*. On the con-

trary, the undisputed evidence of physical pain and suffering, lost earnings, mental anguish and physical impairment negates any finding that the jury was operating under any misconceived notions of the federal income tax laws. The result is that Gulf has failed to sustain its burden to establish prejudicial error, and the failure to submit its requested instruction on federal income taxes was harmless error.

2. The instant case is a *common law negligence action for personal injuries* brought by Gaedecke in a *Texas* District Court for injuries sustained while being evacuated from a drilling platform in the Gulf of Mexico off the coast of *Louisiana*. Under the 1978 Amendments to the Lands Act, Louisiana law was applicable, yet there was no proof in the Texas courts of Louisiana law as to either negligence or damages.

3. The Lands Act gives Gaedecke no federal or any other cause of action, or even implies one; it only adverts to Louisiana law for a remedy.

4. *Liepelt*, which approved a jury instruction not to consider federal income taxes in its award, was a wrongful death case that arose under the FELA, and not under state common law, as the instant case. Further, *Liepelt* requires the introduction of *evidence* regarding federal income taxes as a prerequisite to such an instruction. Gulf provided no evidence whatsoever as to federal income taxes.

5. *Liepelt*, dealing with a federal statutory cause of action, may be retroactively applied in FELA cases only. To do so in this case, governed by Louisiana law, would be a gross miscarriage of justice.

ARGUMENT

I.

THE TEXAS COURTS HAD SUBJECT MATTER JURISDICTION OF THIS CASE, AND EXCLUSIVE JURISDICTION IS NOT, AND NEVER WAS, IN THE FEDERAL COURTS

1. The 1953 Outer Continental Shelf Lands Act

It is a well established principle that federal courts, as opposed to state courts of general jurisdiction, "are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard,* 427 U.S. 1, 15 (1976). And it is a fundamental precept that the limits upon federal jurisdiction imposed by Congress "must be neither disregarded nor evaded." *Owen Equipment and Erection Co. v. Kroger,* 437 U.S. 365, 374 (1978).

What Gulf would have this Court do is to add the word "exclusive" to 43 U.S.C. § 1333(b) by judicial fiat and make it read "*exclusive* original jurisdiction." But this Court holds that it may not by construction insert words in a statute: what Congress omits, it cannot supply. *62 Cases, Etc. v. United States,* 340 U.S. 593, 596 (1951); *Iselin v. United States,* 270 U.S. 245, 250 (1926). It is not the function of this Court to engraft upon a statute additions which Congress logically might or should have made. *United States v. Cooper Corporation,* 312 U.S. 600, 605 (1941).

Congress expresses its purpose by words. Thus, if it had intended for the federal district courts to have *exclu-*

sive jurisdiction of common law personal injury suits under the Lands Act "the ordinary dignities of speech" would have led it to say so,[4] as in the *Deep Seabed Hard Mineral Resources Act* of June 28, 1980, (94 Stat. 553, 580): "The district courts of the United States shall have *exclusive* jurisdiction over any case or controversy arising under the provisions of this Act." (Emphasis ours).

It is submitted that under the decisions of this Court, federal district courts were never given *exclusive* jurisdiction under the original 1953 Lands Act of common law negligence actions for personal injuries.

2. The Outer Continental Shelf Lands Act Amendments of 1978

On September 18, 1978, the Outer Continental Shelf Lands Act Amendments of 1978 became law (P.L. 95-372, 92 Stat. 629).

Former subsection (b) of 43 U.S.C. § 1333(b), giving United States district courts "*original jurisdiction*" was stricken. A *new* provision for "Citizen Suits, Court Jurisdiction and Judicial Review" was added (§ 208, 92 Stat. 649) in a *new* section, (§ 23, 92 Stat. 657-659), and codified as 43 U.S.C. § 1349.

The 1978 Amendments to the Outer Continental Shelf Lands Act were the result of over four years of intense work by the United States Congress, three-and-a-half years of extensive work by a special committee of the House, and "over six years work by the Senate Interior and then

---

4. United States v. Cooper Corporation, (cited in the text), 312 U.S. at 606.

Senate Energy Committee." Hearings were held in more than fifteen cities, a total of 375 witnesses were heard; and more than 10,000 pages of hearing records were compiled. 124 Cong. Rec. H 508.

> For the first time in the history of the Congress, the House set up a special ad hoc select committee to handle a piece of major legislation, and the special procedure worked. Remarks of Mr. Murphy upon the signing of the 1978 Amendment, S. 124 Con. Rec. H 10007.

This was a "comprehensive revision of the OCS Lands Act of 1954 (sic)." 124 Cong. Rec. H 508.

2a. Legislative Intent of the 1978 Amendments

Gulf argues that the 1978 Amendments merely "restated" Section 1333(b) of the 1953 law (Brief for Petitioner, p. 29). It can just as well be said that Congress, in writing a new Section 23 in the 1978 Amendments, and moving the revised "jurisdictional" subsection of old 43 U.S.C. § 1333(b) into that new Section as Section 23 (b)(1), made it clear that such jurisdiction, after 1978, only relates to "citizens suits," and does not relate to common law personal injury suits.

The managers' Joint Statement says:

> It was not the intent of the managers to alter in any way the existing coverage of the Longshoremen's Act, *nor of other remedies that may be available for injury or death.* (Emphasis ours). Joint Explanatory Statement of the Committee on Conference, 124 Cong. Rec. H 8390.

And commenting on the new Section 23, the managers said:

> Rights under any other Act *or the common law to seek appropriate relief are not barred.* (Emphasis ours). Op. cit., 124 Cong. Rec. H 8400.

Section 23(a)(6), 92 Stat. 657, 43 U.S.C. § 1359 (a)(6), says so specifically:

> Nothing in this section [this includes Section (b)(1), the jurisdictional section] shall restrict any right which any person or class of persons may have under any other Act or *common law* to seek appropriate relief. (Emphasis ours.)

In the new section of the 1978 Amendments, "Citizen Suits, Court Jurisdiction and Judicial Review," (Subsection 23 of Section 208, 92 Stat. 657-659), the jurisdictional section involved here, now appears as paragraph (b)(1) of Subsection 23, codified as 43 U.S.C. 1349 (b)(1). This jurisdictional section serves as a fundament for jurisdiction of the *citizen* suits authorized in Section 23. Such *citizen suits* present "case and controversy" problems for plaintiffs, usually articulated in terms of standing to sue. *United States v. Students Chal. Reg. Agcy. Pro.*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). See Rogers, *Handbook on Environmental Law* § 1.13, (1977).

In Subsection 23 of the 1978 Act, the Congress addresses the problem of authorizing citizen suits on the one hand, and how, on the other, to make sure that such

suits do not unduly delay the desired rapid development of the Shelf. Paragraph (a) confers standing to sue on "any person having a valid legal interest which is or may be adversely affected" to "commece a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency . . . ," and paragraph (b) also creates standing, the forum and jurisdiction for such "Citizen Suits."

This "rearrangement' signals that Congress intended former 33 U.S.C. § 1333(b) now Section 1349(b)(1), to relate only to this limited class of citizen suits. The 1978 Amendments further separate the choice of law provision making the law of the adjacent state controlling, 43 U.S.C. § 1333(a)(2)(A) from the provision for jurisdiction over citizens' suits by moving the jurisdictional paragraph into a new section as 43 U.S.C. § 1349(b)(1). These changes were viewed as strengthening "citizen participation" in Shelf development. See remarks of Senator Kennedy on the 1978 Amendments, 124 Cong. Rec. S 16689.

It is also clear from a fair reading of Section 23 of the 1978 Amendments (43 U.S.C. § 1349), that this entire section relates only to citizen suits, *not personal injury suits.* Also, the Legislative history is unequivocal, as shown by the following from the Joint Explanatory Statement of the Committee on Conference (124 Cong. Rec. H 8400):

> The House Amendment provides that all suits challenging violations of the OCS Act or implementing regulations are to be in accordance with this

> new section [referring to Subsection 23 of Section 208 of the House Bill]. Rights under *any other Act or the common law to seek appropriate relief are not barred* . . . (Emphasis added).
>
> * * * *
>
> Section 23 details the procedure by which citizens including lessees, or permittees, employees, local and state governmental officials, and others, can participate in enforcement of the Act. Review of certain types of actions are through administrative proceedings, followed by an appeal in a court of appeals. *Review of other actions are by suits in a district court.* (Emphasis added). Joint Explanatory Statement of the Committee on Conference, 124 Cong. Rec. H 8399.

The purpose of Section 23(a) was to provide for standing to sue, merely "adopting the law in the *Alyeska* case." [*Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975).] Remarks of Mr. Wiggins, 124 Cong. Rec. H 499-500.

> Thus, under this section [Section 23, 43 U.S.C.A. § 1349], a plaintiff can only commence a suit if he has 'a valid legal interest which is or may be adversely affected.' Ordinarily, he must then give notice and wait sixty days before actually commencing litigation. However, if a citizen, with the requisite standing, can also show an imminent threat to the public health or safety, or an immediate effect on his legal interest, he may commence litigation immiately after notification, without waiting the sixty day period. Joint Explanatory Committee, Statement of the Committee On Conference, 124 Cong. Rec. H 8400.

The legislative history of the 1978 Amendments indicates that the new jurisdictional section 43 U.S.C. § 1349(b) relates only to "Citizen Suits," and that state court jurisdiction over negligent personal injury claims was not disturbed. Consequently, the Texas courts had jurisdiction over Gaedecke's in personam transitory action.

2b. Repeal of former 43 U.S.C. § 1333(b)

In *Bruner v. United States*, 343 U.S. 112, 116 (1952), this Court said:

> It is clear, that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. (343 U.S. at 116-117)

The result is that 43 U.S.C. § 1333(b), the former 1953 Lands Act jurisdiction section, was replaced by the enactment of an entirely *new* jurisdiction section, 43 U.S.C. § 1349(b)(1) on *September 18, 1978* during the pendency of this suit. In such pendente lite situations, the jurisdiction of the trial court has been held to be determined as of the date of its judgment—in this case December 18, 1978 (J.A. 3). *Merchants Insurance Co. v. Ritchie*, 5 Wall. 541 (1866).

Further, the Texas Court of Civil Appeals and the Texas Supreme Court were obliged to apply the law in effect at the time they subsequently rendered their respective decisions:

> A change in the law between a nisi prius and an appellate decision requires the appellate court to

> apply the changed law. *Ziffrin, Inc. v. United States,* 318 U.S. 73, 78 (1943).[5]

This court must, therefore, determine the jurisdiction of the Texas courts on the basis of the present controlling law. *United States v. State of Alabama,* 362 U.S. 602, 604 (1960). This presents no "manifest injustice." *Bradley v. School Board of Richmond,* 416 U.S. 696, 721 (1974).

If there was any exclusive federal district court jurisdiction under the original 1953 Lands Act, when Congress enacted, pendente lite, a new jurisdictional section (43 U.S.C. § 1349(b)(1)), any so-called implied "exclusive" jurisdiction ended.

This disposes of the "authorities" cited by Gulf in support of its claim of exclusive jurisdiction (Brief for Petitioner p 11, n.3)[6] because each of these cases were decided under the original 1953 Lands Act and not the 1978 Amendments thereto. These amendments were not in issue in a single one of these cases. In fact, they undoubtedly prompted the Congressional findings in Section 101(8) of the 1978 Amendments (92 Stat. 630):

> [T]here presently exists a variety of technological, economic, environmental, administrative and *legal*

---

5. This has been the rule in both federal and state courts for over 170-odd years. See cases collated in de Rodulfa v. United States, 461 F.2d 1240, 1250, n.50, 51 (D.C. Cir. 1972), cert. den., 409 U.S. 949.

6. Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 (E.D. La. 1972); Borne v. Tenneco Oil Company, 1973 A.M.C. 388 (E.D. La.); Friedrich v. Whittaker Corporation, 467 F.Supp. 1012 (S.D. Tex. 1979); Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La.App. 1965), writ ref'd 175 So. 301; Pool v. Kemper Insurance Group, 386 So.2d 1006 (La.App., May 21, 1980).

> *problems* which tend to retard the development of the oil and gas natural resources on the Outer Continental Shelf. (Emphasis ours).

By omitting the word "original" in the 1978 jurisdictional amendments, a presumption was raised that a change in meaning or purpose was intended. *Pirie v. Chicago Title and Trust Co.*, 182 U.S. 438 (1900); *Bardes v. First National Bank of Hawarden*, 178 U.S. 539 (1900), applying the rule to jurisdiction.

In *Sun Ship, Inc. v. Pennsylvania*, 100 S.Ct. 2432, 2437 (1980), the Court said:

> It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting the intent to command such exclusivity.

3. Concurrent Jurisdiction

The mere grant of *jurisdiction* to a federal court does not imply a denial of historic state court jurisdiction, or give the federal court *exclusive* jurisdiction. *Chaflin v. Houseman*, 93 U.S. 130 (1876). Also see *United States v. Bank of New York Trust Co.*, 296 U.S. 463, 479 (1936). Even when state court litigation is based upon a federal statute, this Court holds that state courts have concurrent jurisdiction with the lower federal courts. *Martinez v. State of California*, 444 U.S. 277, n.7 (1980), citing *Testa v. Katt*, 330 U.S. 386, 394 (1947).

The *Chaflin* rule was followed in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) where the court considered a federal statute that did "not state or even suggest that such [federal] jurisdiction be exclusive." (368

U.S. at 506). The Supreme Judicial Court of Massachusetts, holding it had concurrent jurisdiction, said:

> We do not accept the contention that State courts are without jurisdiction. The statute does not so declare. The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State Courts. (Quoted at 368 U.S. 505).

This Court agreed and affirmed the Massachusetts court's holding that it had concurrent jurisdiction (368 U.S. at 506).

In *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971) the court said it should proceed with caution in construing statutory provisions dealing with the jurisdiction of the federal courts. It quoted (404 U.S. at 212), from *Healy v. Raeta,* 292 U.S. 263, 270 (1934), as follows:

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

There are no "pragmatic factors" to require exclusive federal jurisdiction over the case at bar:

(a) This Court said of the Lands Act in *Chevron Oil Company v. Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296 (1971) that "Congress specifically rejected *national uniformity* and specifically provided for the application of state remedies." (Emphasis ours).

(b) There is no "federal judicial expertise" for a finding of exclusive federal jurisdiction. On the contrary, as state law applies, it is state judges that have expertness in dealing with questions of state law that comes from more extended contact with such questions than federal judges.

4. Historical State Court Jurisdiction on the Shelf

Gulf does not disagree with the truism that federal courts require a specific grant of "exclusive" jurisdiction if they are to exercise "exclusive" jurisdiction (Brief for Petitioner, p. 16). But it counters with a chimera—the Lands Act does not deal with an area of concurrent federal and state jurisdiction, as it only *extended* federal jurisdiction into an *international area outside historical state jurisdiction* (Brief for Petitioner, pp. 12, 16). Gulf says the outer Continental Shelf was, at the time of the enactment of the 1953 Lands Act, *"an international jurisdictional VOID"*. (Brief for Petitioner, pp. 12-15). Ergo, "Congress did not need to employ language granting 'exclusive' jurisdiction to the federal courts" in order to establish such jurisdiction (Brief for Petitioner, p. 13).

It follows that the converse is true, if the state courts in 1953 had historical jurisdiction on the Shelf, then Congress was required to use precise *statutory language* in order to assert *exclusive* jurisdiction.

Gulf's fallacious theory will not wash for two reasons: (a) the "saving to suitors" clause of 28 U.S.C. § 1333, in force in 1953 and (b) the transitory nature of an action for personal injury.

Prior to the adoption of the United States Constitution, in personam actions based on tort were cognizable in the

English and Colonial courts of common law, notwithstanding that the same occurrence gave rise to a cause of action within the admiralty jurisdiction. 7A MOORE'S FEDERAL PRACTICE ¶ .210, pp. 2202, 2203 (1979). It was probably to preserve this concurrent jurisdiction and leave the concurrent power where it stood at common law that Section 9 of the Judiciary Act of 1789 gave United States District Courts exclusive jurisdiction of civil maritime causes and of admiralty, but "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it." *New Jersey Steam Nav. Co. v. Merchants Bank of Boston,* 47 U.S. (6 How.) 344 (1848). The Act has been much amended,[7] but despite some change in wording its effect remains unchanged. *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 361 (1959); *Madruga v. Superior Court of California,* 346 U.S. 556, 560, n.12 (1954). As amended in 1948 and incorporated in 28 U.S.C. § 1333, it reads: "saving to suitors in all cases all other remedies to which they are otherwise entitled." This was the law when the 1953 Lands Act was enacted.

The result is that in 1953 a suitor who held an in personam maritime claim, including a cause of action for personal injury, could bring an ordinary common law action against the person liable in a state court. *Romero, supra,* 358 U.S. at 475; *Madruga, supra,* 346 U.S. at 560, 561; GILMORE & BLACK, THE LAW OF ADMIRALTY 37, 40 (2d ed. 1975); 1 BENEDICT ON ADMIRALTY, § 122, pp. 8-8 -9 (7th rev. ed. 1974). He had a *historic* option to pursue a common law remedy and to select his forum, state or federal. *Romero, supra,* 358 U.S. at 371.

---

7. 1 BENEDICT ON ADMIRALTY § 122, p. 8-3, n.2 (7th rev. ed. 1974).

The "savings clause" explicitly recognized that some matters maritime had been traditionally administered by common law courts of the original states. *Romero, supra,* 358 U.S. at 362.

The following cases are demonstrative:

In *The Hamilton (Old Dominion S.S. Co. v. Gilmore),* 207 U.S. 398, 404 (1907), the issue was the applicability of a Delaware wrongful death statute which had been applied in admiralty proceedings to an ex delicto claim for death on the high seas. The only doubt in the case was the power of the states where Congress has remained silent. The court said the "savings clause" in the 1789 judiciary act:

> [L]eaves open the common law jurisdiction of the state courts over torts committed at sea. This we believe has always been admitted.

Accord: *Western Fuel Co. v. Garcia,* 257 U.S. 233, 242 (1921).

Rounds v. Cloverport Foundry & M. Co., 237 U.S. 303 (1915) held that a suit in personam against an individual defendant is not cognizable in admiralty, but is within the clause saving a common law remedy, and a state court has jurisdiction.

Panama R. Co. v. Vasquez, 271 U.S. 557 (1926) was a negligence suit under the Seaman's Act of 1915 as Amended by the Merchant Marine Act of 1920. The defendant contended that state courts could not entertain such actions because they *were cognizable only in federal district courts.* This Court disagreed. It noted that the Judicial Code then in effect was only a continuation of the "savings clause" in the Judiciary Act of 1789,

which had (1) always permitted recovery for tortious acts asserted and enforced in personam according to the course of the common law, and (2) uniformly permitted such actions to be brought in either the federal or state courts.

Also see cases cited in *Moore, supra,* § .210, p. 2204, note 9.

Such then was the law when Congress in the Original 1953 Lands Act granted federal courts "original jurisdiction" of controversies arising out of exploratory operations on the Shelf in 43 U.S.C. § 1333(b). Under the existing law, Gaedecke had a historic concurrent common law action in a state court for the personal injuries he suffered on the Shelf.

As historical concurrent state jurisdiction existed, it behooved Congress when it asserted jurisdiction of federal courts under the Lands Act, to claim *exclusive* jurisdiction by *statutory language* if exclusive jurisdiction was what was desired.

It is submitted that insofar as state court tort jurisdiction was concerned, the Shelf was not terra incognito in 1953.

5. As Congress Did Not Grant the Federal Courts Exclusive Jurisdiction Over Torts Arising On the Shelf, Gaedecke Could Pursue His Historical Common Law Remedy in Any Court That Had in Personam Jurisdiction Over Mobil.

We have shown above that (i) Congress did not grant the federal courts exclusive jurisdiction over torts on the Shelf (*supra,* pp. 16, 17, 23-25), and (ii) the states had historical common law jurisdiction over such torts (*supra,* pp. 26-29). Under these circumstances, Gaedecke was en-

titled to pursue his common law cause of action against Mobil in Texas courts of general jurisdiction where he obtained in personam jurisdiction over Mobil. *Dennick v. Central Railroad Company v. R. R. Co.,* 103 U.S. 11 (1881); *Ormsby v. Chase,* 290 U.S. 387 (1933); 20 Am. Jur. 2d *Courts* § 123 at p. 478 (1965). The transitory concept of a case that might have arisen anywhere was recognized at the beginning of the fourteenth century in the common law of England. *Reasor-Hill Corp. v. Harrison,* 249 S.W.2d 994 (Ark. Supp. 1952).

Once jurisdiction was obtained over Mobil, the Lands Act did require that the Texas courts apply the law of Louisiana, the state adjacent to the drilling platform (43 U.S.C. § 1333(a)(2)(A)). But as no proof of Louisiana law was offered under Texas procedural rules, it was presumed to be the same as the law of Texas (*infra,* p. 38).

II.

NORFOLK AND WESTERN RAILWAY COMPANY V. LIEPELT, 444 U.S. 490, 100 S.CT. 755, 62 L.Ed. 689 (1980) IS NOT APPLICABLE TO THIS CASE; BUT IF IT IS, FAILURE TO CHARGE THE JURY AS TO FEDERAL INCOME TAXES WAS HARMLESS ERROR UNDER THE FACTS OF THIS CASE

1. Assuming Arguendo Liepelt Applies to the Instant Case, Failure to Charge the Jury as to Federal Income Taxes Was Harmless Error.

In this Court, as in any other appellate court, "He who seeks to have a judgment set aside because of an erroneous

ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman,* 318 U.S. 109, 116 (1943). This burden of itself raises the harmless error rule—does the error "affect the substantial rights of the parties." 28 U.S.C. § 2111. In applying the rule, each case stands on its own record. *Kotteakos v. United States,* 328 U.S. 750, 762 (1946). The rule applies to jury instructions. See *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 629 (1959).

It is submitted that if *Liepelt* does apply to the case at bar, any error in failing to submit Gulf's Requested Instruction C on income taxes is harmless error, and presents exactly the situation considered by the Eighth Circuit in *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (8th Cir. Sept. 4, 1980), *a FELA personal injury case.*

There, the Court:

(a) Recognized that an appellant has the burden to establish the prejudicial effect of a trial court's failure to submit a requested instruction; jury instructions being subject to the "harmless error" rule (632 F.2d at 889);

(b) Held in effect that there is no hypothesis that a failure to give a nontaxability instruction causes juries to increase awards; but on the contrary, there is empirical data that juries in general do not increase recoveries in the belief that they are subject to income tax, citing Kaeven, *A Report on the Jury Project,* Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-68 (1957), (632 F.2d at 890);

(c) Said that the *Liepelt* award was not supported by even the plaintiff's evidence, was a wrongful death case

where plaintiff's proof concentrated on his loss of pecuniary earnings and contribution to his dependents, whereas in the personal injury case before it, plaintiff was not only entitled to loss of future income but also *compensation for substantial pain and suffering* (*Id.*);

(d) Held that under those circumstances the verdict did not indicate that the jury erroneously speculated that plaintiff's award would be subject to income tax (*Id.*);

(e) Noted particularly that the railroad was not prevented (nor was Gulf in the case at bar) from offering evidence of net earnings as was the railroad in *Liepelt,* and it failed to point out any evidence that the jury inflated its award on the erroneous belief that the award would be taxable, but on the contrary,

> [T]he evidence fully supports the jury's verdict and indicates the jury was not operating under any misconceived notions of the tax laws. (*Id.*).

Therefore without evidence of an excessive verdict, as in *Liepelt,* the Court found no reversible error. Accord: *Ingle v. Illinois Cent. Gulf R. Co.,* 608 S.W.2d 76, 83 (Mo. App. 1980).

We have set out the holding in *Flanigan* at length because it is on all fours with the instant case.

(1) Physical Pain and Suffering

Gaedecke was seriously injured. He required sixty days of hospitalization on five different occasions, three major operations, and some three years after the accident was still in pain. His injuries and pain are permanent (Appendix D hereto).

(2) Lost Earnings

At the time of his injury, Gaedecke was thirty years of age with a work life expectancy of thirty-five years, i.e., until he was sixty-five years of age (S.F. 220-221, 322-323). He was earning some $1,000 per month at the time of his injury in 1975, with wages for offshore oil workers increasing at about ten percent a year (S.F. 37). While on the platform he was provided food and lodging (S.F. 68). He worked seven days on the platform and had seven days off, but was paid full time (S.F. 224-225, 314, 315, 316).

A projection of Gaedecke's anticipated earnings to age sixty-five shows he would have earned $3,941,768.76.[8] This figure does not include food and lodging for half his work time or inflation. Even with 30% overall impairment for his injury (S.F. 272), this could reduce anticipated earnings to some $1,300,000.00. *Missouri K. & T. Ry. Co. v. Beadsley,* 155 S.W. 183, 187 (Tex. 1913). The jury found $900,000, obviously not excessive as this figure does not include physical pain, mental anguish or physical impairment for which he was entitled to damages under the court's charge (Tr. 240). Gaedecke's verdict is more than supported by the evidence.

It is interesting that Gulf, Mobil's indemnitor, did not pursue in the appellate courts its trial court claim that the damages in this case were without support in the evidence (Tr. 311). (See Gulf's Points of Error in the Court of Civil Appeals, Brief for Appellant, pp. 4-13). In failing

---

8. Future earning capacity is arrived at by multiplying past earning capacity ($12,000 annually) by work life expectancy (35 years) and for Gaedecke an annual increase of ten percent. Green v. Rudsenske, 320 S.W.2d 228, 236 (Tex. Civ. App.—San Antonio 1959, no writ).

to raise excessive damages on appeal, Gulf abandoned the right to invoke *Liepelt,* which in its final analysis is an excessive verdict case without support in the evidence. Cf. *Ingle, supra,* 608 S.W.2d at 83.

2. Liepelt Is a FELA Statutory Wrongful Death Case and Does Not Apply to the Case at Bar, a Common Law Negligence Case For Personal Injury Governed By the Law of Louisiana.

The case at bar is a common law negligence case for personal injury governed by the law of Louisiana. *Liepelt* was a statutory FELA wrongful death case.

Under the Lands Act Gaedecke's common law cause of action for personal injuries against a nonemployer negligent tortfeasor is governed by the law of the state adjacent to the fixed drilling platform on which Gaedecke worked for Gulf. This is Louisiana. Original 1953 Lands Act, 43 U.S.C. § 1333(a)(2), and as amended in 1978, 43 U.S.C. § 1333(a)(2)(A). Such state law is "surrogate federal law." *Rodrique v. Aetna Casualty Company,* 395 U.S. 352, 365 (1969).

It is uniformly held that the law of the adjacent state, in this case Louisiana, applies to actions for personal injuries and for wrongful death sustained on offshore drilling platforms. See *Chevron Oil Company v. Huson,* 404 U.S. 97, 100 (1971); *Walker v. Tenneco Oil Co.,* 615 F.2d 1121, 1123 (5th Cir. 1980); *Moczygemba v. Danos & Curiole Marine Contractors,* 561 F.2d 1149, 1151, n.1, (5th Cir. 1977); *Bertrand v. Shell Oil Company,* 489 F.2d 293, 294 (5th Cir. 1973).

The Fifth Circuit has specifically held that in determining *damages* in cases of wrongful death and personal

injuries suffered on an offshore drilling rig adjacent to the coast of Louisiana, the law of Louisiana applies. *Dickerson v. Continental Oil Company,* 449 F.2d 1209, 1213, 1215 (5th Cir. 1971). No reason exists for a court applying Louisiana law in a suit for common law negligence to resort to the measure of damages required in a statutory federal cause of action such as FELA.

Two Circuits, *Estate of Spinosa,* 621 F.2d 1154, 1158, 1159 (1st Cir. 1980) and *Croce v. Bromley Corp.,* 623 F.2d 1084, 1096, 1097 (5th Cir. 1980), have refused to apply *Liepelt* in diversity cases because it was a FELA case and they were obliged to look to state law concerning jury instructions on income tax. *Spinosa* observed that *Liepelt* "does not mandate an across-the-board change in the majority rule" on the subject (621 F.2d at 1158). *Croce* held that the refusal to give a requested jury instruction that any award would not be subject to federal income tax would not be error in *Louisiana,* and refused to reverse and remand the case for a new trial (623 F.2d at 1097, 1098).

Judge Nickerson, sitting in the Eastern District of New York, in *Vasina v. Grumman Corp.,* 492 F.Supp. 943, 945 (E.D.N.Y. 1980) reached the same conclusion and limited *Liepelt* to FELA cases.

To apply FELA jury instructions regarding federal income tax in a case governed by Louisiana law, particularly without even knowing what that law is, would violate this Court's admonition about the Lands Act: "Federal courts should not create interstitial federal common law when Congress has directed that a *whole body* of state law shall apply." *Chevron Oil Company v. Huson,* 404 U.S. 97, 104, 105 and n.5.

There is no reason to saddle the Lands Act with the vagaries of federal common law which is limited to (1) cases in which a state is a party; (2) cases involving maritime law; (3) cases involving federal "proprietary interests"; and (4) cases concerning international law. Hill, *The Law Making Power of The Federal Courts, Constitutional Preemption,* 67 COLUM. L. REV. 1024, 1025 (1967).

Liepelt stands only for the limited proposition that the measure of damages in FELA cases is governed by the terms of the statute which created the cause of action and which defines specifically the measure of damages. It has no application to a case under the Lands Act.

3. Congress Created No Statutory Cause of Action for Personal Injuries by Enacting the Lands Act.

There is no congressional statute in this lawsuit which purports to create the cause of action for personal injuries instituted by Gaedecke, much less prescribe his measure of damages. Certainly, there is not one word in the Lands Act, and petitioner cites none, that gives Gaedecke his cause of action for personal injuries in this case. Instead we have a clear case of *casus omissus:* Gaedecke's cause of action is governed by the common law. That is, it does not rest its authority upon any express statute but upon the decisions of the Louisiana courts. See *Western Union Teleg. Co. v. Case Publishing Co.,* 181 U.S. 92, 101, 102 (1901).

That Gaedecke's common law remedy was not changed by the Lands Act is made clear by this court in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971):

> Congress specifically rejected national uniformity and specially provided for the application of *state remedies.* * * * (404 U.S. at 104) (Emphasis ours).
>
> * * * *
>
> A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and *familiar remedies.* (404 U.S. at 107, 108). (Emphasis ours).

These remedies, as they do not depend on a statute, can only be common law remedies. "The Act [Lands Act] allows a plaintiff any type of negligence, strict liability or contract actions which would be cognizable under *state law.*" (Emphasis ours). *Bourg v. Texaco Oil Co., Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978).

Under the Federal Tort Claims Act, 28 U.S.C. § 2674, damages are determined by the law of the place where the tortious act was committed. 28 U.S.C. § 1346(b). Both the original 1953 Lands Act and the 1978 Amendments make damages in this case determinable under the law of Louisiana.

The situation under the Federal Tort Claims Act and the Lands Act are clearly analogous. In *Draisma v. United States*, 492 F.Supp. 1317, 1327 (W.D. Mich. 1980), a Federal Tort Claims Act case, the defendant argued that as the Michigan courts had not taken a position on the question of federal income taxes in damage awards, such awards should be reduced as a matter of federal law. The Court rejected this contention and refused to apply *Leipelt* because it was a FELA case.

Following the criteria laid down in *Cort v. Ash*, 422 U.S. 66 (1975) the Fifth Circuit in an exhaustive opinion

reached the conclusion that the Lands Act affords a worker injured on the Shelf no remedy or cause of action, but on the contrary, requires him "to look to state [Louisiana] law for redress" and that such a controversy "should be controlled by state law." *Olsen v. Shell Oil Company*, 561 F.2d 1178, 1190 (5th Cir. 1977), cert. den. 444 U.S. 979. This, because no civil remedy may be implied from the Lands Act:[9]

(a) "[A] cause of action should not be created unless the primary purpose of the Act (or at least one of the primary purposes) is to benefit or protect the workers on offshore oil platforms." (561 F.2d 1187). The legislative history of the Lands Act shows that if this was the case it was "at best secondary concern." (561 F.2d at 1188).

(b) State law should govern the controversy, "not solely because there are 'gaps in the Federal Code,' " but because Congress recognized "that the individual states had a very real interest in the workers on these platforms." (561 F.2d at 1189).

The Texas district court, following Texas procedural rules, in the absence of any tender of any proof of Louisiana law on either negligence or measure of damages for personal injuries, correctly presumed that Louisiana law was the same as Texas law. Tex. R. Civ. P. 184a (Appendix C); *Gevinson v. Manhattan Const. Co. of Oklahoma*, 449 S.W.2d 458, 465, n.2 (Tex. 1969). Then, following *Turner v. General Motors*, 584 S.W.2d 844,

---

9. The doctrine of an implied cause of action had its origin in Couch v. Steel, 3 E. & B. 402, 118 Eng. Rep. 1193 (Q.B. 1854). Today, its effects have been largely repudiated by the English Courts. See Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MODERN L. REV. 233 (1960).

853 (Tex. 1979) it refused to instruct the jury that income tax consequences of its award of damages should not be considered.

4. As No Evidence Regarding Federal Income Tax Was Introduced By Gulf, Liepelt Is Inapplicable to the Case at Bar.

In *Liepelt,* this Court of necessity restricted itself to the facts before it and decided that the jury's verdict was, *under the evidence,* excessive. Liepelt's expert, using gross earnings without any deduction for income taxes, produced a damage total reduced to present value of $302,000 (100 S.Ct. at 756, 62 L.Ed.2d at 689). The railroad objected to this evidence and unsuccessfully offered to prove by its own expert that taking into account decedent's federal income taxes, and making different assumtions, that the net pecuniary loss was $138,327. The jury returned a verdict of $775,000! (100 S.Ct. at 756, 757, 62 L.Ed.2d at 696). On these facts the case appears to be no more than an ordinary case of an excessive verdict without evidentiary support.

Liepelt is not germane to the present case where Gulf made no effort to introduce any evidence whatsoever of Gaedecke's estimated after-tax earning. It clearly holds that, except in cases of *de minimus,* evidence of the impact of future income tax in calculating an award is required if the jury is to be instructed that federal income tax should not be considered in fixing the amount of the award (100 S.Ct. at 758 and n.7, 62 L.Ed.2d at 697 and n.7). The Court gives these assuring words to trial judges and counsel:

> * * * But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an *expert calculation* in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. * * * (*Id.*) (Emphasis ours).

However, Gulf presented nothing to the jury in the nature of "an expert calculation," and submitted its Requested Jury Instruction C (J.A. 12) without any evidence whatsoever on which to base it. The admonitory instruction not to consider income taxes in making a damage award was given in *Liepelt* only after it was raised by evidence, both proffered and admitted.

5. On Equity and Justice

The two cases cited by Gulf as to the retroactive application of *Liepelt—Lang v. Texas Pacific Railway Co.*, 624 F.2d 1275 (5th Cir. 1980) and *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72 (4th Cir. 1980), (Brief for Petitioner, pp. 40, 41) are but FELA cases applying statutory federal law, not state common law.

But the foregoing legal dogma aside, as a member of the bar of this Court, I would be remiss if I did not frankly say that for this Court to now deny Gaedecke prompt compensation for serious, painful and permanent injuries[10] suffered over four years ago, the justice of which has been determined by a jury and some thirteen judges, would produce substantial inequitable results. And this only because of a failure to give a jury instruction, after the overruling, not reasonably foreshadowed, of clear past precedent. *Ingle, supra*, 608 S.W.2d at 83.

---

10. See Appendix D to this brief.

To remand this case for a new trial because the Texas courts were not psychic enough to envision *Liepelt* would delay this case another four years—a total of eight. One of the reasons Judge Campbell concurred in the majority not applying *Liepelt* in *Spinosa, supra,* was that seven years had elapsed since the occurrence of the accident sued on in that case. Under those circumstances, he felt it "undoubtedly the better part of wisdom" to affirm (621 F.2d at 1163). There is no "compelling reason" to give retroactive effect to *Liepelt* here. *Ingle, supra,* 608 S.W. 2d at 83, 84.

Beginning in 1964 the Fifth Circuit consistently held no admonitory instruction as to federal income taxes should be given in a personal injury suit, even in cases based on a federal statute. *Prudential Ins. Co. of America v. Wilkerson,* 327 F.2d 997, 998 (5th Cir. 1964); *Cunningham v. Bay Drilling Co.,* 421 F.2d 1398, 1399 (5th Cir. 1970); *Greco v. Seaboard Coastline R.R.,* 464 F.2d 496, 497 (5th Cir. 1972); *Johnson v. Penrod Drilling Co.,* 510 F.2d 234, 236, 237 (5th Cir. 1975, en banc), cert. den. 423 U.S. 839. The Texas Supreme Court has so held since 1956. *Missouri-Kansas-Texas Railroad Co. v. McFerrin,* 291 S.W.2d 931, 935 (Tex. 1956); *Turner v. General Motors Corp.,* 584 S.W.2d 844, 853 (Tex. 1979). So did the great majority of cases decided in both state and federal courts since World War II. Annot. 63 ALR 2d 1393 (1959), Later Case Service p. 780 (1976); 1980 Supp.; *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880, 886, n.2 (8th Cir. 1980).

Under these circumstances, we simply fail to see where justice would be served by penalizing Gaedecke for not having the prescience as to what this Court would ab-

ruptly do with respect to charging a jury about federal income taxes in a personal injury case. *Ingle, supra,* 608 S.W.2d at 83. With all due respect, we think the Delphi oracle would have missed this one.

It will be remembered that even Alice prevailed over the King, who was acting as judge, in the famous case of *Who Stole the Tarts?* when he tried to exclude her from the courtroom under "Rule Forty-two":

> "Well, I sna'n't go, at any rate," said Alice: "besides, that's not a regular rule: *you invented it just now.*" (Emphasis ours).
>
> * * * * *
>
> The King turned pale, and shut his note-book hastily.
>
> LEWIS CARROLL, ALICE IN WONDERLAND, Chapter XII, *Alice's Evidence,* Random House, New York (1965), p. 141.

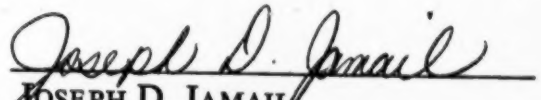
CONCLUSION

1. Neither the 1978 Amendments nor the original 1953 Lands Act give federal courts exclusive jurisdiction of this suit. If this case were dismissed for want of jurisdiction, Gaedecke would lose his remedy because of the statutes of limitation.

2. Assuming this Court has jurisdiction to determine the matter and it determines that *Liepelt* applies to this case, the failure to instruct the jury as to the nontaxability of its award, as was done in *Liepelt,* was harmless error.

The judgment of the court below should be affirmed.

Respectfully submitted,



JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Counsel of Record for Respondent Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three copies of the foregoing Brief of Respondent Steven Gaedecke were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Charles D. Kennedy, Esq.
Royston, Rayzor, Vickery & Williams
3710 One Shell Plaza
Houston, Texas 77002;

Frank Caton, Esq.
Crain, Caton, James & Womble
Two Houston Center
Houston, Texas 77002;

(3) Service on each of such parties was made on February 17, 1984, by depositing said copies of this Brief of Respondent Steven Gaedecke in a United States Post Office, first class postage prepaid, and addressed to the above-named counsel.

Joseph D. Jamail

JOSEPH D. JAMAIL

APPENDIX A

5 Vernon's Texas Rules of Civil Procedure p. 530 (1967)

Rule 481. Amendment of Application and Briefs

The application, or brief or the argument in support thereof, or in reply thereto, may be amended at any time when justice requires upon such reasonable terms as the court may prescribe. The record and appeal bond may be amended in the Supreme Court under the same circumstances and on the same terms as in the Court of Civil Appeals under Rules 428, 429, 430 and 431.

APPENDIX B

2A Vernon's Texas Rules of Civil Procedure, p. 460 (1976)

Rule 276. Refusal or Modification

When an instruction, special issue, definition or explanatory instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon 'Refused,' and sign the same officially. If the trial judge modifies the same he shall indorse thereon 'Modified as follows: (stating in what particular he has modified the same) and given, and exception allowed' and sign the same officially. Such refused or modified instruction, special issue, definition or explanatory instruction, when so indorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

APPENDIX C

2 Vernon's Texas Rules of Civil Procedure, p. 488 (1976)

Rule 184a. Judicial Notice of Law of Other States, Etc.

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review.

APPENDIX D

Gaedecke's Injuries

The jury found compensatory damages of $900,000—lost earnings, past and future; physical pain, past and future; mental anguish, past and future; physical impairment, past and future (Tr., Vol. II, p. 240).

At the time of his injury on September 22, 1975, Gaedecke was 30 years of age (S.F. 220, 221). He had worked for Gulf since May, 1975 as a roustabout (S.F. 224). His physical condition was good and he was able to perform the heavy manual labor his job required (S.F. 223).

Because Gaedecke's leg was increasingly painful, he sought medical attention five days after his injury (S.F. 285). The result was that he spent a total of 60 days in the hospital on five different occasions and had three major operations:

FIRST: September 28, 1975 - October 11, 1975 (S.F. 102) - 13 days

SECOND: February 11, 1976 - February 22, 1976 (S.F. 103) - 9 days

THIRD: June 30, 1976 - July 9, 1976 (S.F. 104) - 9 days

FOURTH: July 9, 1976 - July 16, 1976 (S.F. 108-109) - 7 days

FIFTH: November 30, 1976 - December 20, 1976 (S.F. 104) - 20 days

First (9-28-75 - 10-11-75)

Gaedecke was treated by Dr. Zoran Cupic, an orthopedic surgeon (S.F. 234-236), who first saw him in the emergency room at Memorial City General Hospital on September 28, 1975 when he was called in because Gaedecke was in extreme pain (S.F. 239, 240, 245). The pain was in his back and radiated down the left leg having become increasingly worse since the accident (S.F. 241). This to Dr. Cupic, indicated a herniated disc —a disc out of place pressing against a nerve root, more serious than ordinary low back pain (S.F. 241). He ordered Gaedecke's immediate admission to the hospital and commenced conservative treatment—traction, physical therapy, muscle relaxants, complete bed rest, medication and heat massage (S.F. 243, 244).

This treatment did not prove effective (S.F. 245), so after several days an "EMG" was performed by inserting needles in Gaedecke's legs to measure the amount of nerve damage coming from the back and going into the leg muscles. This showed some changes and a myelogram was ordered (S.F. 246). This was done by inserting needles into the spine, injecting a dye, and while the patient was tilted back and forth on a table, x-rays were taken to see if there was, in fact, a defective disc pressing against a nerve root (S.F. 247). A damaged disc was found in Gaedecke's lower back pressing against a nerve in the left side, and surgery was decided upon (S.F. 248, 249).

On October 4, 1975, Gaedecke was operated on for the first time. Major surgery was performed whereby the offending disc was removed by laminectomy, i.e., part of the vertebrae was removed and the nerve root adjusted; not to effect a cure, but only to relieve the pain (S.F. 251, 252). It created scar tissue and caused the

loss of about a pint of blood (S.F. 252, 253). Gaedecke remained in the hospital until October 11, 1975 because of that bleeding (S.F. 253).

Second (2-11-76 - 2-22-76)

After his discharge from Memorial City General Hospital in October, 1975, Gaedecke remained under Dr. Cupic's care for some time but did not progress. In February, 1976, he had a relapse and more pain; was readmitted to the hospital on February 11, 1976, where he improved; was discharged on February 22, 1976, but continued office treatment with Dr. Cupic (S.F. 254, 255).

Third and Fourth (6-30-76 - 7-16-76)

In June, 1976 Gaedecke had another relapse (ten months after the accident). His symptoms exacerbated and he was readmitted to Memorial City General Hospital on June 30, 1976 (S.F. 255, 256). A second myelogram was performed showing a spinal defect at the same level, worse than the one prior to the surgery, severe scarring and hypertrophy of tissue around the area of the surgery (S.F. 256).

A neurosurgeon, Dr. Moiel, was called in, who was of the opinion that the scarring should be removed. The second major surgery was performed at St. Luke's Hospital on July 9, 1976—a foraminotomy, whereby part of the backbone and scarring was removed to free the nerve root in an effort to relieve his pain in both the back and leg (S.F. 256-259).

Fifth (11-30-76 - 12-20-76)

Dr. Cupic saw Gaedecke next at the end of 1976 when he again complained of low back pain. He was readmitted

to Memorial City General Hospital on November 30, 1976 (S.F. 104, 260), where he was found to be suffering from "instability of the low back" due to the surgery which had produced one of the most severe, prolonged and disabling kinds of pain that a person can sustain (S.F. 261). A "fusion," the third major operation, was performed. Bone was taken from the back of the pelvis and placed on top of the vertabra by going through the back in order to allow the bone to heal over (four to six months) so there would be no motion at that level and pain would decrease (S.F. 262). Here again the purpose was not to cure but to relieve pain, leaving the back rigid at that level (S.F. 263).

Prognosis

Notwithstanding all of the above treatment and surgery, Gaedecke will experience pain and stiffness in his back all of his life. Dr. Cupic knows of nothing else that can be done for him (S.F. 265, 274, 275). Gaedecke is not and never will be employable for work that requires bending, stooping, lifting or things of that nature (S.F. 266). He is restricted to sedentary work for life (S.F. 268, 269, 275).

The result is that, if one goes by numbers, Gaedecke's overall permanent impairment from the results of the injury is 30% (S.F. 272), and his employable disability for any kind of strenuous activity is 100% (S.F. 275).

The surgery was obviously only partially beneficial to Gaedecke. At the time of the trial in November 1978, he was having pain most of the time, trouble in sleeping, his back and leg bothered him and any kind of activity made him stiff and sore. He was taking aspirin and valium (S.F. 286).

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT MOBIL

FRANK E. CATON
THOMAS B. GREENE, III
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Attorneys for Respondent, Mobil Oil Corporation

Of Counsel:

CRAIN, CATON, JAMES & WOMBLE
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED FOR REVIEW

1. Whether State Courts have subject matter jurisdiction of cases or controversies arising out of operations on the Outer Continental Shelf.

2. Whether the Supreme Ccurt should review a State Court ruling based on state procedural law if such law does not preclude assertion of a federal right.

LIST OF PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, counsel for Respondent Mobil certifies that the following is a complete list of all parties to the proceeding in the court whose judgment is to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this case:

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L.A. Levy, Inc.
   Offshore Crews, Inc.
   Kemper Insurance Group
   American Motorists Insurance Company
2. Steven Gaedecke, Plaintiff.
3. Jamail, Kolius & Mithoff, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.
6. Underwriters subscribing Policy No. J.F.X. 0007, issued to ENSERCH Corp. and Pool Offshore Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
SUMMARY OF ARGUMENT	1
ARGUMENT ON THE MERITS	3
I. THE LANGUAGE OF THE ACT SUPPORTS CONCURRENT JURISDICTION	8
II. CONGRESSIONAL SILENCE RAISES A PRESUMPTION OF CONCURRENT JURISDICTION	8
III. THE IMPLIED EXCLUSIVITY EXCEPTION TO THE PRESUMPTION OF CONCURRENT JURISDICTION SHOULD NOT BE APPLIED	10
A. Concurrent State Court Jurisdiction Would Not Be Incompatible With The Purpose Of The Outer Continental Shelf Lands Act	14
B. The Need For Uniformity And Predictability Would Not Be Adversely Affected	15
C. Federal Judicial Expertise	15
D. State Courts Would Not Discourage Or Be Hostile To Actions Arising Out Of Operations On The Outer Continental Shelf	16
E. The Interests Of Federalism Can Best Be Served By Concurrent Jurisdiction	17
F. Any Uncertainty Or Inconvenience Caused By Forum Shopping Is Unavoidable	17
IV. A STATE COURT IS OBLIGATED TO HEAR CASES AND CONTROVERSIES ARISING OUT OF OPERATIONS ON THE OUTER CONTINENTAL SHELF	18
V. WHETHER STATE PROCEDURAL LAW EFFECTIVELY PRECLUDED ASSERTION OF A FEDERAL RIGHT	20
CONCLUSION	23

TABLE OF AUTHORITIES

CASES	Page
Alaska Packers Assn. v. Industrial Accident Commission, 294 U.S. 532, 541, 79 L.Ed. 1044, 1049, 55 S.Ct. 518 (1934)	5
Atchison, Topeka & Santa Fe Ry. Co. v. Sowers, 213 U.S. 55, 70, 53 L.Ed. 695, 702, 29 S.Ct. 397 (1908)	4, 5
Bounds v. Caudle, 560 S.W.2d 925, 930 (Tex. 1977)	21
California v. Arizona, 440 U.S. 59, 66, 59 L.Ed.2d 144, 151, 99 S.Ct. 919 (1979)	9
Charles Dowd Box Co. v. Courtney, 93 U.S. 130, 23 L.Ed. 833 (1876)	9
Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 at p. 303	6
Claflin v. Houseman, 93 U.S. 130, 23 L.Ed. 833 (1876)	2, 9
Douglas v. New York, New Hampshire & Hartford RR., 279 U.S. 377, 388, 73 L.Ed. 747, 49 S.Ct. 355 (1929)	19
Evans v. Cornman, 398 U.S. 419, 26 L.Ed.2d 370, 376, 90 S.Ct. 1752 (1970)	8
Garcia v. Prescott, 570 S.W.2d 562, 566 (Tex. Civ. App. —Corpus Christi 1978), writ ref'd. n.r.e.	21
Henry v. Mississippi, 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965)	3, 21, 23
Herb v. Pitcairn, 324 U.S. 117, 126, 89 L.Ed. 789, 65 S.Ct. 459 (1945)	2, 21
Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 66, 58 L.Ed. 2d 292, 299, 99 S.Ct. 383 (1978)	4
International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945)	5
Johnson v. Penrod Drilling Co., 510 Fed.2d 234, 236-37 (5th Circuit), (en banc), cert. denied, 423 U.S. 839, 96 S.Ct. 68, 69, 46 L.Ed.2d 58 (1975)	23
Kline v. Burke Construction Co., 260 U.S. 226, 233-34, 67 L.Ed. 226, 231-32, 43 S.Ct. 79 (1922)	5
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1860)	15
Miller Bros. v. Maryland, 347 U.S. 340, 342, 98 L.Ed. 744, 747, 74 S.Ct. 535 (1953)	4
Mondou v. New York, New Haven & Hartford RR., 223 U.S. 1, 56 L.Ed. 327, 32 S.Ct. 169 (1912)	2, 18, 19
Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875)	2, 20
Norfolk & Western Ry. Co. v. Liepelt, 100 S.Ct. 755, 758 (1980)	21, 22, 23

CASES

	Page
Olsen v. Shell Oil Co., 561 F.2d 1178, 365 So.2d 1285, 574 F.2d 194	16
Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969)	7, 8
Shaffer v. Heitner, 433 U.S. 186, 196, 53 L.Ed.2d 683, 693, 97 S.Ct. 256-9 (1977)	4
St. Louis Iron Mountain & Southern Ry. Co. v. Taylor, 210 U.S. 281, 285, 52 L.Ed. 1061, 1064, 28 S.Ct. 616	4
Testa v. Katt, 330 U.S. 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947)	17, 19
Thompson v. Whitman, 18 Wall. 457, 465, 21 L.Ed. 897, 900 (1873)	4
United States v. Bank of New York, 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936)	2
United States v. California, 332 U.S. 19, 91 L.Ed. 1889, 67 S.Ct. 1658	7
United States v. Louisiana, 339 U.S 699, 94 L.Ed. 216, 70 S.Ct. 914	7
United States v. Texas, 339 U.S. 707, 94 L.Ed. 1216, 70 S.Ct. 914	7
Walters v. St. Louis, 347 U.S. 231, 232, 98 L.Ed. 660, 663, 74 S.Ct. 505 (1953)	4
Williams v. North Carolina, 325 U.S. 226, 229, 89 L.Ed. 1577, 1581, 65 S.Ct. 1092 (1944)	4

UNITED STATES CONSTITUTION

Art. VI, Clause 2	21

UNITED STATES STATUTES

28 U.S.C. § 1338(a)	9
43 U.S.C. § 1301, et seq. (1953)	14
43 U.S.C. § 1331, et seq. (Supp. 1979)	1
43 U.S.C. § 1333(a)(2)	15
46 U.S.C. § 688	15

Page

TEXAS CONSTITUTION

Art. V, § 8 (1891) 5

STATE STATUTES

Act of May 16, 1941, L. Tex. 47th Legislature, p. 454 7
Act of May 23, 1947, L. Tex. 50th Legislature, p. 451 7
6 Dart, Louisiana General Statutes (1939) §§ 9311.1-9311.4 7

TEXTS

Redish and Muench, *Adjudication of Federal Causes of Action in State Courts,* 75 Michigan Law Review, 311, 318 (1976) 10
U.S. Code Congressional & Administrative News, 2177, 2177-2178 (1953) 14
Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harvard Law Review, 509 (1957) 16
Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power,* pp. 115, 130 (1980) 17, 20
Hodges, *Special Issue Submission in Texas,* 34 (1959) ... 21

MISCELLANEOUS

H. R. Rep. No., 1835, 95th Cong., 2nd Session (1978) 6
S. Rep. No. 411, 83d Cong. 1st Sess. 6 (1953) 1
Cong. Rec., Vol. 99, Part 5, pp. 625-666, 6962, 7233, 7260 . 11, 12, 13

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT MOBIL

SUMMARY OF ARGUMENT

I. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq. (Supp. 1979) extended the jurisdiction of the federal courts to cases and controversies arising out of operations on the Outer Continental Shelf. S. Rep. No. 411, 83rd Congress, 1st Sess. (1953). The language of the Act does not explicitly provide that such cases and

controversies are to be heard exclusively in the Federal District Courts.

A grant of jurisdiction to the Federal District Courts does not of itself, imply that jurisdiction is to be exclusive. *United States v. Bank of New York,* 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936).

The Act provides that the Outer Continental Shelf and artificial islands erected thereon are to be treated as an area of exclusive federal jurisdiction located within a State. Residents of such enclaves are subject to the jurisdiction of State courts.

Where the Act is silent, and a detailed inquiry into the legislative history makes it unclear whether Congress intended jurisdiction to be exclusive, the State Courts have concurrent jurisdiction, whenever by their own constitution they are competent to take it. *Claflin v. Houseman,* 93 U.S. 130 (1876).

The State District Court was not only empowered to take jurisdiction, it had an affirmative obligation to do so in the absence of any valid excuse for refusal to adjudicate. *Mondou v. New York, New Haven & Hartford RR.,* 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912).

II. The Trial Court's refusal to instruct the jury that its award of damages, if any, would not be subject to federal income taxation was based on a determination of state procedural law. The fact that the State Court's implementation of state procedural law also decided an issue of federal law does not entitle Gulf Offshore to a review of that decision. *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn,* 324 U.S. 117, 126, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

The State Court's ruling did not have the effect of undermining or invalidating federal law. The procedural rule requiring the kind of proof offered in *Liepelt,* and approved by the Court, is not burdensome and is not aimed at precluding assertion of a federal right. It is founded on the state's interest in maintaining uniform, predictable and familiar procedures. It was based on a specific state procedural rule and was not influenced by the State Court's interpretation of the *Liepelt* decision. The State's insistence on compliance with its procedural rule serves a legitimate state interest. The recognized distinction between the substantive and procedural branches of the independent and adequate state ground doctrine mentioned in *Henry v. Mississippi,* 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) is therefore not applicable.

ARGUMENT ON THE MERITS

There is not and never has been a void in subject matter jurisdiction over disputes arising out of incidents that take place on the Outer Continental Shelf. Gulf Offshore contends that at the time of the passage of the Outer Continental Shelf Lands Act, there was a political jurisdictional void that was filled by the legislation. Gulf Offshore further argues that the extension of federal political jurisdiction to the Outer Continental Shelf results in exclusivity of federal court jurisdiction. It would appear that Gulf Offshore considers *political* jurisdiction synonymous with *judicial subject matter* jurisdiction. These two concepts are highly distinctive, however, and cannot be equated.

The term "jurisdiction" is utilized in many contexts. Indeed, this Court has recognized numerous types of

jurisdiction, involving executive, judicial, and legislative powers: *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 66, 58 L.Ed.2d 292, 299, 99 S.Ct. 383 (1978) (municipal police jurisdiction); *Walters v. St. Louis,* 347 U.S. 231, 232, 98 L.Ed. 660, 663, 74 S.Ct. 505 (1953) (jurisdiction to tax); *Miller Bros. v. Maryland,* 347 U.S. 340, 342, 98 L.Ed. 744, 747, 74 S.Ct. 535 (1953) (jurisdiction to tax, jurisdiction to legislate); *Thompson v. Whitman,* 18 Wall. 457, 465, 21 L.Ed. 897, 900 (1873) (subject matter judicial jurisdiction, inpersonam judicial jurisdiction; in rem judicial jurisdiction); *Shaffer v. Heitner,* 433 U.S. 186, 196, 53 L.Ed.2d 683, 693, 97 S.Ct. 256-9 (1977) (quasi in rem judicial jurisdiction); *Williams v. North Carolina,* 325 U.S. 226, 229, 89 L.Ed. 1577, 1581, 65 S.Ct. 1092 (1944) (jurisdiction to grant a divorce [another facet of subject matter judicial jurisdiction]).

Power to tax is generally restricted to the territory of the state or entity involved. *Walters v. St. Louis, supra.* Power to grant divorce extends only over domiciliaries of a state. *Williams v. North Carolina, supra.* But the exercise of subject matter jurisdiction, over a dispute, by the judicial branch of any government is not limited to events that take place within its territory, or within the area in which it has political jurisdiction. It has long been held that each state may set the limits of the jurisdiction of its own courts and may "entertain in its courts transitory actions, where the cause of action has arisen outside its borders." *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers,* 213 U.S. 55, 70, 53 L.Ed. 695, 702, 29 S.Ct. 397 (1908); *St. Louis Iron Mountain & Southern Ry. Co. v. Taylor,* 210 U.S. 281, 285, 52 L.Ed. 1061, 1064, 28 S.Ct. 616. "[T]he power of a state to effect legal con-

sequences is not limited to occurrences within the state . . ." *Alaska Packers Assn. v. Industrial Accident Commission,* 294 U.S. 532, 541, 79 L.Ed. 1044, 1049, 55 S.Ct. 518 (1934).

Assuming, *arguendo,* that there was no political jurisdiction over the Outer Continental Shelf, it does not follow that a state court could not take cognizance of a cause of action that arose on the Outer Continental Shelf.

The restrictions on a state's judicial subject matter jurisdiction are imposed by the laws of that state as well as the Constitution of the United States. *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers, supra.* Gulf Offshore does not argue that the Texas State Court's jurisdiction over it offends traditional notions of fairness and due process. *See International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). The Texas Constitution provides that the district courts are courts of original general jurisdiction and have the power to adjudicate negligence suits. TEX. CONST. art. V, § 8 (1891). There are thus no restrictions on the courts of Texas to adjudicate this matter and were none when the Outer Continental Shelf Lands Act was implemented.

There was at that time a federal judicial jurisdictional void, which the Act filled by creating original *federal* district court jurisdiction. Federal inferior courts have no jurisdiction until Congress grants it. *Kline v. Burke Construction Co.,* 260 U.S. 226, 233-34, 67 L.Ed. 226, 231-32, 43 S.Ct. 79 (1922).

During the Senate debates on the Shelf Lands Act, Senator Price Daniel of Texas stated that prior to May, 1953, the Attorney General of Texas had filed 17 suits on behalf of the State against operators in 17 offshore

fields to enforce the state's conservation laws. Throughout the 26 year period from the passage of the original act until consideration of the 1978 amendments, lawsuits based on controversies arising out of operations on the Outer Continental Shelf were being filed in various state courts. This fact was mentioned in the 1978 Senate debate on the accelerated leasing program and its environmental effects:

> "This list does not include the countless number of suits that have been filed in various State Courts." Congressional Records, August 22, 1978, P. S 13995.

The impediment to the accelerated leasing program caused by the countless lawsuits filed in the federal and state courts was the impetus for the new Section 1349 of the Act which provides for citizens' suits, and contains the revised jurisdiction and venue provisions. H. R. Rep. No., 1835, 95th Congress, 2nd Session (1978).

Concurrent jurisdiction in the state courts of Shelf Lands Act cases has been an assumed fact. A footnote in the opinion of Justice Stewart in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 at p. 303, evidences that understanding:

> "This is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case . . . We hold only that the state statute of limitation is a part of the law to be applied in federal court as it would be part of the law to be applied in a state court.

Prior to the enactment of the Outer Continental Shelf Lands Act, the states of Louisiana and Texas in 1938

and 1941, respectively, sought to extend their boundaries to a line in the Gulf of Mexico 27 marine miles from their shorelines. 6 Dart, Louisiana General Statutes (1939) §§ 9311.1-9311.4; Act of May 16, 1941, L. Tex. 47th Legislature, p. 454. In 1947 Texas extended her boundary to the outer edge of the Continental Shelf. Act of May 23, 1947, L. Tex. 50th Legislature, p. 451.

The Original Complaints filed by the United States in *United States v. California,* 332 U.S. 19, 91 L.Ed. 1889, 67 S.Ct. 1658, *United States v. Louisiana,* 339 U.S. 699, 94 L.Ed. 216, 70 S.Ct. 914, and *United States v. Texas,* 339 U.S. 707, 94 L.Ed. 1216, 70 S.Ct. 914, all allege that the respective states, claiming rights in the lands and minerals underlying the Gulf of Mexico adverse to the United States, had made leases under their statutes to various persons and corporations which had entered upon said lands, drilled wells for the recovery of petroleum, gas and other hydrocarbon substances, and paid the respective states substantial sums of money and bonuses, rent, and royalties. The complaints asked for decrees enjoining the states and all persons claiming under them, from continuing to trespass upon the area in violation of the rights of the United States, and requiring the states to account for the money received by them. In all three cases, this Court granted the relief prayed for. It is implausible that the states of California, Louisiana, and Texas were involved in all of the activities alleged in the government's complaints, and at the same time did not provide a forum for adjudication of cases or controversies which arose or might arise out of such activities.

Gulf Offshore's quote from *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969) states the adminis-

tration's opposition to committing the area of the Outer Continental Shelf "solely" to the jurisdiction of state courts. Mobil does not contend that jurisdiction should rest solely in the State Courts, or that federal courts can not interpret, apply and enforce the law.

I.

THE LANGUAGE OF THE ACT SUPPORTS CONCURRENT STATE COURT JURISDICTION

The Court in *Rodrique* paraphrases Subsection (a)(1) of the Act and states that:

> Over the objections of the administration that these [artificial] islands were not located within a State, the bill was amended to treat them "as if [they] were [in] an area of exclusive Federal jurisdiction located within a State." Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352, 365 (1969).

The residents of an area of exclusive federal jurisdiction located within a State are "subject to the process and jurisdiction of state courts". *Evans v. Cornman*, 398 U.S. 419, 26 L.Ed.2d 370, 376, 90 S.Ct. 1752 (1970).

II.

CONGRESSIONAL SILENCE RAISES A PRESUMPTION OF CONCURRENT JURISDICTION

Many federal statutes contain express grants of exclusive jurisdiction to the Federal District Courts: e.g., "The District Courts shall have original jurisdiction of any civil action arising under any act of Congress relating

to patents, plant variety protection, copyright and trademarks. Such jurisdiction shall be exclusive of the courts of the states. . . ." 28 U.S.C. § 1338(a). Where the statute is silent (e.g., the Sherman and Clayton Acts) the Court must develop standards or tests which will establish uniformity and predictability in determining whether Federal Court jurisdiction is exclusive or concurrent.

In *Claflin v. Houseman,* 93 U.S. 130, 23 L.Ed. 833 (1876), the Supreme Court established the following test for exclusivity:

> "The general question, whether State Courts can exercise concurrent jurisdiction with the Federal Courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises . . . The result of these discussions has, in our judgment been . . . to affirm the jurisdiction, where it is not excluded by express provision, or by incompatability in its exercise arising from the nature of the particular case." 93 U.S., at 136.

The Court has stated that the *Claflin* test "has remained unmodified through the years", *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507, 7 L.Ed.2d 483, 82 S.Ct. 519 (1962); and "concurrent jurisdiction has been a common phenomenon in our judicial history", *Id.* at 507. Indeed, concurrent jurisdiction is presumed. *California v. Arizona,* 440 U.S. 59, 66, 59 L.Ed.2d 144, 151, 99 S.Ct. 919 (1979).

Gulf Offshore contends that the grant of jurisdiction to the Federal Courts in the Outer Continental Shelf Lands Act "contains no concurrent grant of judicial power to state courts", resulting in a conclusion that

state court jurisdiction was not to apply in the area. This is the same misunderstanding of the law that Professor Redish attributed to the members of Congress when the Clayton Act was passed (i.e., the member's belief that Congress' failure to make jurisdiction explicitly concurrent rendered the jurisdiction exclusively federal). Redish and Muench, *Adjudication of Federal Causes of Action in State Courts,* 75 *Michigan Law Review,* 311, 318 (1976).

III.

THE IMPLIED EXCLUSIVITY EXCEPTION TO THE PRESUMPTION OF CONCURRENT JURISDICTION SHOULD NOT BE APPLIED

The Legislative History Does Not Make Clear that Congress Intended to Preempt the Existing Jurisdiction of the State Courts.

The Congressional Record of the so-called "Tidelands bills" contains over 6,000 pages of testimony and documents from the hearings conducted by the Senate Committee on Interior and Insular Affairs, and the House Judiciary Committee. The jurisdictional clause of both the House and Senate versions of the various bills which were submitted are not significantly different. The question of exclusivity was not directly answered. Quotations in support of or in refutation of exclusivity can be found throughout the Congressional Record. For example, when presenting the report of the Senate Committee on Interior and Insular Affairs, reiterating that committee's statement when it reported Senate Joint Resolution 13, the same Senator Cordon who is quoted in Gulf Offshore's Brief, posed the following question:

> "In what Court, where situated, does jurisdiction lie, or where should it be placed? . . ."

A few moments later, Senator Cordon stated:

> "After the passage of Senate Joint Resolution 13, your committee turned its attention to those questions, and it has tried to bring to the Senate in S. 1901 an answer to at least some of them. . . ." Vol. 99, Part 5, Congressional Record, p. 6962 (1953).

Gulf Offshore's quotation from the Attorney General's statement that: ". . . it is important that the Federal Government, which has the responsibility for handling foreign relations have the exclusive control of lawmaking and law enforcement" is simply a statement of opinion unsupported by any exposition of the reasons for the conclusion. The statement does not clearly address the issue before the Court. No one has or can question the Federal Government's paramount right to make the laws or to enforce them. The question is what Court may interpret and apply the law. The legislative branch has the responsibility to make the law; the executive branch the responsibility for enforcing the law. It may be reasonable to assume that the Attorney General had the judicial branch in mind when he referred to enforcing the law. But, assumptions are not a sound basis for rebutting presumptions.

It is clear from a review of the record, that most of Congress's time was spent on three principle issues:

1. What body of law should be applied?;

2. What use would be made of the revenues realized from development of the mineral resources?; and

3. What portion, if any, of the revenues would be received by the adjacent states?

The quotations from Senators Ellender and Long of Louisiana, contained in Gulf Offshore's Brief demonstrate why Professor Redish believes that total reliance on legislative history may be unwise because it is often self-serving, fragmentary and uncertain. In their attempts to sway their colleagues, both senators described the Act as a further encroachment on State's rights by the Federal government, a confiscation of state property, and an imposition of further administrative expense on the adjacent states. Their interpretations of the meaning and effect of the Act were given in debate in opposition to the passage of the Act. Their interpretations did not persuade and are, therefore, no support for the contention that they reflect the intent of the Congress which rejected or ignored them.

Further review of the same pages of the record from which the quotations attributed to Senators Ellender and Long are taken, further demonstrate the importance of not placing total reliance on legislative history:

> "Mr. Kefauver: May I ask further if state jurisdiction . . . is not extended to the workmen . . . beyound whatever limit might be established? Under what jurisdiction would they come if this amendment were not agreed to?
>
> Mr. Ellender: That is a question I cannot answer. . . ." Vol. 99, Part 5, Congressional Record, p. 7233 (1953).

On the same page can be found the folowing apparently contradictory statements by Senator Long:

> "Mr. Long: Yes. If we could find no federal law applicable, we would use the law of the abutting states; but there would not be state jurisdiction.
>
> Mr. McCarran: If I catch the senator's point, it is proposed to load upon the adjacent state the expense of taking care of the trial.
>
> Mr. Long: Yes."

The same Mr. J. Lee Rankin, Assistant Attorney General of the United States, whose report is quoted by Gulf Offshore was, according to Senator Long, evasive when questioned on the subject of the law and the jurisdiction. According to Senator Long:

> ". . . Mr. Rankin, who testified for the Department of Justice, answered evasively the first three questions I asked him on this subject. I asked him if State Courts should not be able to handle a dispute between state citizens, or if citizens should not be able to avail themselves of state services. His answers were always evasive. He would always say in effect, 'that does not mean that the States should receive any revenue.' " *Id.*, p. 7234.

Despite Mr. Long's comment, a review of Mr. Rankin's statement to the Senate Committee reveals that the specific question of subject matter jurisdiction was never discussed. The only discussion concerned the body of law to be applied. Vol. 99, Part 5, Congressional Record, pp. 625-666 (1953).

The record also discloses that there was considerable misunderstanding among the members of both the House Judiciary Committee and the Senate Interior and Insular Affairs Committee. Senator Price Daniel of Texas commented very late in the Senate debates that the House

bill, H.R. 5134 "does apply state laws and concurrent state jurisdiction." *Id.*, p. 7260. At that stage of the legislation, the language of the jurisdictional clauses of both the House and Senate bills were identical.

The Congressional Record fails to disclose how Congress would have answered the issue of exclusive Federal Court jurisdiction if it had addressed the question directly. In resolving the question Congress might have considered the following determinative factors:

A. Concurrent State Court Jurisdiction Would Not Be Incompatible With The Purpose Of The Outer Continental Shelf Lands Act

The principal objectives of the Outer Continental Shelf Lands Act were provision for the leasing and development of the area by the Federal government, and the exchange of state leases for federal leases in the same area. *U.S. Code Congressional & Administrative News,* 2177, 2177-2178 (1953).

In the so called "quitclaim legislation" the coastal states were given exclusive rights to the resources of the Continental Shelf up to three marine leagues in the case of the Gulf Coast states, and three geographical miles for Atlantic and Pacific states, from their coasts. Pub. L. No. 31, 67 Stat. 29, 43 U.S.C. 1301 et seq. (1953). That act also reaffirmed the jurisdiction, power and control of the United States beyond that point. In effect, the act established the boundaries of the Federal and State control over the seabed and subsoil of the shelf.

The national interests of the United States with respect to treaties, defense, and foreign commerce would not be obstructed or interfered with by a State Court in adjudi-

cating cases or controversies arising out of operations on the shelf. There is no basis for a contention that State courts would treat federal rights any different in Shelf Lands cases than they do in maritime cases.

B. The Need For Uniformity And Predictability Would Not Be Adversely Affected

The Act specifically provides that the body of law to be applied is the Constitution and Laws of the United States, and the civil and criminal laws of each adjacent state, to the extent they are applicable and are not inconsistent with the Act or other federal laws and regulations. 43 U.S.C. § 1333(a)(2). State Courts regularly interpret and enforce federal law. They are required to enforce principles of federal law when they decide state causes of action. *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat) 304 (1860). Gaedecke was injured while working on a service boat performing the traditional work of a seaman. Had he elected to file a Jones Act suit, he could have alleged negligence under that act, and unseaworthiness under the General Maritime Law; and elected to file his suit in any federal or state district court where the court had in personam jurisdiction of the Defendant. 46 U.S.C. § 688. Either court would have been required to apply federal statutory and common law principles. In the present case, had the Plaintiff chosen a federal forum, that court would have been required to apply the state law of Louisiana.

C. Federal Judicial Expertise

No weight should be given to an alleged need for federal judicial expertise. The federal bench is no better equipped to interpret and apply the various bodies of law

applicable to the Outer Continental Shelf than are the judges of the adjacent states. A federal court judge is not ordinarily more knowledgable than a state court judge concerning the state law to be applied. There is no technical problem inherent in cases and controversies filed under the Act which federal judges are better equipped to adjudicate. *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions,* 70 Harvard Law Review, 509 (1957).

Federal Courts frequently experience extreme difficulty in determining what the state law is before applying it. *See Olsen v. Shell Oil Co.,* 561 F.2d 1178, 365 So.2d 1285, 574 F.2d 194.

Since the litigant has the option to choose either a federal or state forum, any alleged harm that follows from his choice is self-imposed, and would not adversely affect the rights of other individual litigants.

State court judges also need exposure to maintain their expertise in interpreting and applying federal law.

D. State Courts Would Not Discourage Or Be Hostile To Actions Arising Out Of Operations On The Outer Continental Shelf

There is nothing in the history of the Act since its passage which would indicate that State Courts might be hostile to litigants or to federal rights. It is the usual case that the litigant who chooses a forum is a citizen of the state in which the action is filed. State Courts would be expected to be receptive to cases or controversies which involve the rights of their own citizens, whether the rights arose under federal or state laws.

E. The Interests Of Federalism Can Best Be Served By Concurrent Jurisdiction

The power and obligation of State Courts to hear federal cases is well established. *Testa v. Katt,* 330 U.S. 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947). The individual State's interest in controversies arising offshore and involving its citizens is as strong as in similar cases or controversies involving shore-side causes of action. As Professor Redish states:

> "In adopting a federal system, we have concluded that it is generally appropriate for individual states to establish their own substantive goals for the welfare of their citizens and to determine how to achieve these goals . . . The Supreme Court has chosen not to develop a federal common law to regulate purely private commercial transactions or accidents on land, . . . It is difficult to understand why controversies which arise from occurrences on water are somehow of a different order."

Redish, *Federal Jurisdictions: Tensions in the Allocation of Judicial Power,* p. 115 (1980).

F. Any Uncertainty Or Inconvenience Caused By Forum Shopping Is Unavoidable

A potential litigant in a case arising out of operations on the Outer Continental Shelf cannot validly argue that forum shopping will result in uncertainty, inconvenience or confusion. A party can predict which body of law he may use as a guide in planning his future conduct. The Defendant will not be able to predict whether he will be forced into a state or federal forum, but the outcome of a case is not likely to turn exclusively on the forum

in which the case is brought. The federalism concern with preserving the balance between competing state and federal interests and policies would not be affected by concurrent jurisdiction. Permitting the use of different procedures in state and federal court would not result in a difference in outcome. The unfairness which is alleged to result from the opportunity of a litigant to choose between two court systems applying different law is not applicable with respect to the substantive law which is the same in cases arising out of operations on the shelf regardless of the forum chosen. The differences in the procedural law as between the state and federal courts is not unfair to litigants. That is particularly true in the present case since the state of Louisiana has adopted the Federal Rules of Civil Procedure, and the state of Texas has done likewise to a great extent. While some trial attorneys prefer one forum over the other, the procedural differences are not difficult to comply with. Attorneys practicing in coastal states are regularly exposed to both the state and federal court systems.

The Supreme Court has rejected the argument that it would be "inconvenient and confusing" to apply federal standards of liability in FELA cases and different state standards in others. *Mondou v. New York, New Haven & Hartford RR*, 223 U.S. 1 (1912).

IV.

A STATE COURT IS OBLIGATED TO HEAR CASES AND CONTROVERSIES ARISING OUT OF OPERATIONS ON THE OUTER CONTINENTAL SHELF

State Courts must adjudicate federal claims brought before them. *Mondou v. New York, New Haven & Hart-*

ford RR., Id.; Testa v. Katt, Id. The federal jurisdictional policy that the case load created by a particular federal cause of action should be shared by the federal and state judicial systems requires a State Court to adjudicate federal causes of action unless it exercises its discretion to decline to hear the federal cause of action under the valid excuse doctrine. *Douglas v. New York, New Hampshire & Hartford RR.*, 279 U.S. 377, 388, 73 L.Ed. 747, 49 S.Ct. 355 (1929). In the present case the State Court had no valid excuse to refuse to exercise its jurisdiction. The suit was based on an analogous state created right-common law negligence. Even if it is assumed that a State Court may decline jurisdiction when it is called upon to adjudicate a non-analogous right, that issue did not arise. Even if it had been based on a non-analogous right, the Supreme Court has said:

> "It is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects . . . but it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

Mondou v. New York, New Hampshire & Hartford RR., Id.

If each State Court could decide whether to adjudicate federal causes of action, it would be impossible to assure the sharing of the case load by the two judicial systems. Professor Redish concludes that:

> "If the State Courts could frustrate these federal policies by simply declining to adjudicate the federal claims, the concept of federal supremacy would be

> considerably undercut. . . . The resulting unpredictability in the federal judiciary's case load could conceivably hinder congressional decision-making concerning the structure and jurisdiction of the Federal Courts. It, therefore, seems unwise to presume that Congress intended such a result unless, of course, it explicitly provides in the terms of a new statute that State Courts are to be given the power but not the duty to hear federal cases."

Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power,* p. 130 (1980).

Since the legislative history of the Outer Continental Shelf Lands Act is silent or at least unclear and contradictory, the Court might make its own inquiry into the relative weight to be given the above factors. Had Congress considered these factors, it would have expressly provided for concurrent jurisdiction.

V.

WHETHER STATE PROCEDURAL LAW EFFECTIVELY PRECLUDED ASSERTION OF A FEDERAL RIGHT

In *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875), the Supreme Court rejected the argument that the Court was invested with power to review State Court determinations of state law which had no effect upon federal issues. The Court concluded that such an invasion of state prerogatives is not justified within the federal system. That premise is the basis of the "independent and adequate state ground doctrine". If a State Court decision rests upon a determination of state law, the fact that the state court also decided an issue of federal law does not authorize the Supreme Court to

review the determination of the federal question. Justice Jackson, in *Herb v. Pitcairn,* 324 U.S. 117, 126, reh. den. 325 U.S. 117, 65 S.Ct. 1188 (1945) explained the basis for the doctrine:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

The above discussion applies to situations in which the State Court has decided two substantive legal issues, one state and one federal.

The second basis of the adequate state ground doctrine concerns state procedural rules. In the present case, the State Court refused to give a jury instruction which Appellant contends it was required to give in accordance with the Supreme Court's decision in *Norfolk & Western Ry. Co. v. Liepelt,* 100 S.Ct. 755, 758 (1980). Gulf Offshore failed to comply with the State Court's procedural requirement that an instruction is proper only if it finds support in the evidence and the inferences to be drawn therefrom. See *Bounds v. Caudle,* 560 S.W.2d 925, 930 (Tex. 1977); *Garcia v. Prescott,* 570 S.W.2d 562, 566 (Tex. Civ. App.—Corpus Christi 1978), writ ref'd. n.r.e.; Hodges, *Special Issue Submission in Texas,* 34 (1959).

The Court in *Henry v. Mississippi,* 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) held that the advisory opinion rationale has no application where the state ground is purely procedural. The Supremacy Clause, U.S. Constitution, Art. VI, Clause 2, prevents a state from invalidating federal law through

the use of its own procedural rules. If the State Court's application of its procedural rule had precluded Gulf Offshore from asserting its alleged right to a *Liepelt* instruction, the Supreme Court could review the State Court's decision in order to determine whether or not the procedural rule serves a valid purpose, or merely had the effect of undermining or invalidating federal law. In *Liepelt,* the Court recognized that the calculation of the effect of income taxes on the decedent's past and future earnings was complicated and held that it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings. Such calculations cannot be made by the average jurors without expert testimony concerning the effect of exemptions or exclusions, tax brackets, and tax rates, all of which are subject to change. A jury's computation is not required to conform to strict mathematical calculation, but it should be based on evidence and not pure speculation. The Court did not suggest that a jury instruction should be used as a substitute for the required proof. As stated by the Court:

> ". . . The trial bench has developed effective methods of presenting essential elements of an expert calculation in a form that is understandable by juries. . . ."

Norfolk & Western Ry. Co. v. Liepelt, Id. at 758.

Evidence of the impact of future income taxes in calculating a damages award is a prerequisite to a jury instruction. The requested instruction, unsupported by any evidence which would aid the jury in making a calculation, would allow the very speculation which the

Court has held was too complex for a jury's deliberations. *Johnson v. Penrod Drilling Co.*, 510 Fed.2d 234, 236-37 (5th Circuit), (en banc) cert. denied, 423 U.S. 839, 46 L.Ed.2d 58, 96 S.Ct. 68, 69 (1975).

The Trial Court had no discretion to give the requested instruction. It would have been error to do so.

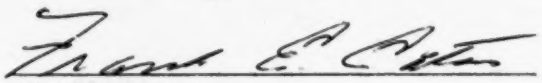
The kind of proof offered in *Liepelt* and approved by the Court is not included in the Trial Court record. The procedural rule requiring such proof is not burdensome and is not aimed at precluding assertion of a federal right. It is founded on the state's interest in maintaining uniform, predictable and familiar procedures. It was grounded on the state law and was not influenced by the State Court's interpretation of applicable federal law. The state's insistence on compliance with its procedural rule serves a legitimate state interest. Therefore, the recognized distinction between the substantive and procedural branches of the independent and adequate state ground doctrine mentioned in *Henry v. Mississippi, Id.* at 447, is not applicable.

CONCLUSION

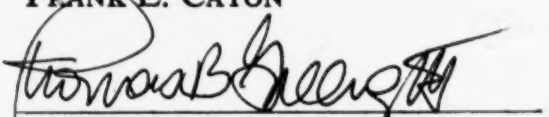
For the foregoing reasons, the Court should affirm the Judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. Costs should

be taxed against Gulf Offshore Company, a Division of the Pool Company.

Respectfully submitted,



FRANK E. CATON



THOMAS B. GREENE, III

Attorneys for Respondent,
Mobil Oil Corporation

Of Counsel:

CRAIN, CATON, JAMES & WOMBLE
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief for Respondent have been forwarded, by United States Certified Mail, Return Receipt Requested, to each of the following counsel:

Mr. Joseph D. Jamail
Jamail, Kolius & Mithoff
3300 One Allen Center
Houston, Texas 77002

Mr. Bradley A. Jackson
Royston, Rayzor, Vickery & Williams
3710 One Shell Plaza
Houston, Texas 77002

this 20 day of February, 1981.

Of CRAIN, CATON, JAMES
& WOMBLE